

CITY OF AUSTIN

Construction Grants Essentials

Construction Contracts Guide

CONTRACT MANAGEMENT DEPARTMENT

1/15/2013

City of Austin Capital Improvement Projects (CIPs) are sometimes funded by state or federal grants or other outside source(s) whereby contracting requirements and contract management activities are also defined by the granting/funding entity. This guide is designed as a reference for the City of Austin's Contract Management Department, Contract Managers and Project Managers working on CIPs funded by state or federal grants. For those contracts where monitoring is dictated by an outside source, the process discussed in this procedure should not supplant City requirements but may be used to supplement other monitoring activities.

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Guide Organization

This guide is organized into three main sections: Overview, Contract Components Checklists, and Contract Components details.

Section 1 – Overview

The Overview section provides basic information concerning federal and state requirements associated with local government's CIP contracts, COA's general responsibilities, and definitions used in this guide.

Section 2 – Contract Component Checklists

The Contract Component Checklists are tools to ensure compliance with grant requirements and assist in staying organized during the period of grant oversight. Because special terms and conditions can vary dramatically based on the grant, and each grant has its own unique issues; these checklists can be tailored to each project, and are organized into four areas according to the following sequential contract stages:

- A. Bid Document Preparation
- B. Letting and Award
- C. Contract Execution, and
- D. Contract Administration / Management

Early on after a project initiation briefing with the Project Manager (PM) &/or Sponsor Department; CMD's Contract Manager (CM / CMT) identifies all applicable requirements in the checklists shown in Section 2. As the project progresses, the checklists can also be a useful way of ensuring all contract components are addressed and confirm requirements have been met.

Section 3 – Contract Components

This section provides more detailed discussion of each of the components required for CIP contracts funded with state and federal funds. The Contract Components section follows the same four contract stages mentioned in the Contract Component Checklist:

- A. Bid Document Preparation
- B. Letting and Award
- C. Contract Execution, and
- D. Contract Administration / Management

Section 3 provides additional details for each requirement and can be a useful reference at any time.

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City of Austin / Grantee – General Responsibilities

1. Understand grant requirements prior to accepting grant.
2. Administer and manage the grant in compliance with Federal regulations, grant agreement, and applicable circulars.
3. Manage and report on progress of projects, expend grant funds in a timely and effective manner and, closeout grants when activities are complete.
4. Maintain the project work schedule and constantly monitor grant activities to ensure that schedules are met and other performance goals are achieved.
5. Ensure compliance with applicable requirements (TXDOT, FHWA, FAA, FTA, etc.)
6. Account for project property, provide for its repair and replacement, and maintain property inventory records that contain all elements required.
7. Request and withdraw Federal cash only in amounts and at times as needed to make payments that are immediately due and payable.
8. Keep expenditures within the latest approved budget.
9. Demonstrate and retain satisfactory continuing control over the use of project property.
10. Ensure that effective control and accountability is maintained for all grants, subgrants, cash, project property, and other assets. Grantees and subgrantees must ensure that resources are properly used and safeguarded, and that funds, equipment, and property are used solely for authorized purposes.
11. Prepare and submit required reports.
12. Update and retain required reports and records for availability during audits and oversight reviews.
13. Ensure an Annual Single Audit (A-133) is conducted in accordance with OMB Circular, A-133 (***) **Frequently developed by State &/or City wide level. Verify departmental responsibilities on a case by case basis** (***)

Definitions

Grant. Grant means an award of financial assistance, including cooperative agreements, in the form of money, property in lieu of money, or other financial assistance paid or furnished by the state or federal government to carry out a program in accordance with rules, regulations and guidance provided by the grantor agency. The term does not include technical assistance which provides services instead of money, or other assistance in the form of revenue sharing, loans, loan guarantees, interest subsidies, insurance or direct appropriations. Also, the term does not include assistance, such as a fellowship or other lump sum award, for which the grantee is not required to account.

Grants are usually administered via a contractual agreement between the City (**Grantee**) and the party providing funding (**Grantor**).

Grantee. City of Austin. Party who receives. Acceptor. Beneficiary. Grantee means the component of a State, local or federally-recognized Indian tribal government which is responsible for the performance or administration of all or some part of a federal or state award.

The grantee is the entire legal entity even if only a particular component of the entity is designated in the grant award document.

Grantor. Agency who grants or gives something. A person or entity who makes a grant in legal form; “conveyed from grantor to grantee”. The “grantor” may also be referred to as granting agency, funding agency, grantmaker, etc.

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Project: _____ **Date:** _____

A. Bid Document Preparation – Federal and State Requirements			
Requirement	Reference	City Responsibility (Check if Applicable)	√
Bonding & Insurance	23 CFR 635.110 Licensing and Qualification of Contractors	Submit qualifying / licensing procedures to TXDOT/Grantor for approval. Include approved provisions in bid document.	
	Government Code §2253.021 Transportation Code §223.006	Performance bonds required if the contract is in excess of \$100,000. Payment bonds required if the contract is in excess of \$25,000 (\$50,000 for municipalities). COA Standard Documents: <ul style="list-style-type: none"> ○ 00610 - Performance Bond ○ 00620 - Payment Bond 	
	Grant Specific – per state & federal laws, Grant Agreement, Grantor’s rules and policies, etc.	Confirm with granting agency. Some grantors (like Capital Metro, Travis County and others) may require they be named as additional insured / in the certificate of insurance (COI); or other special requirements associated with bonding and insurance. ○ _____	
Railroad Insurance Provision	23 CFR 646.107	Include requirement for railroad insurance in bid document when work is in the railroad right-of-way (ROW).	
Buy America	23 CFR 635.410 Buy America requirements	Include provisions in bid document . COA Standard Documents: <ul style="list-style-type: none"> ○ 00810A - Standard federal-Aid Assurances ○ 00686 – Buy American Preferences 	
	Transportation Code 223.045	If TXDOT/Grantor awards the contract and the work is on the state highway system without federal aid, must contain the same preference provisions for steel and steel products that are required under federal law for a federally funded project.	
Change Orders	23 CFR 635.120 Changes and extra work	Develop procedures outlining the conditions under which a change order is allowed and include in bid document.	
Child Support Documentation	Family Code §231.006	Include language required by state statute <i>verbatim</i> in bid document.	
Claims	23 CFR 635.124 Participation in contract claim awards and settlements	Develop procedures outlining the conditions under which a claim is allowed and include in bid document.	
Contract Time	23 CFR 635.121 Contract time and contract time extensions	Grant recipients should have adequate procedures for determining contract time. (<i>And per change orders requirements; develop procedures outlining the conditions under which a change order is allowed and include in bid document.</i>)	

Debarment Certification	23 CFR 635.112(g)	Include statement of certification (Form FHWA 1273) in bid document.		
Designated Material Sources / Disposal sites	23 CFR 635.407	Develop public interest finding if specific sources are called for in the bid document.		
Differing Site Conditions	23 CFR 635.109	Ensure that the contract language contained at 23U.S.C. 112(e) is included verbatim in the bid Document.		
Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)	49 CFR 26	The City must: <ul style="list-style-type: none"> o develop their own program (in accordance with 49 CFR 26) or adopt TXDOT/Grantor's approved DBE program in coordination with TXDOT/Grantor and the FHWA Texas Division Office. o Establish project goal and include in bid document. o Include DBE provisions in bid document. o Use DBEs certified under the Texas Unified Certification Program. <p>*** Check w/ SMBR & Grantor for grant / project specifics</p>		
	Texas Administrative Code §9.55	Ensure SBE provision requirements are included in bid document.		
Equal Employment Opportunity	Title VI 49 CFR 21 23 CFR 200	Develop a Title VI plan, policy and assurances. (<i>***City wide – Include COA Standard Specs. Section 631 in all contracts and Section 810A in federal aid contracts***</i>) Title VI nondiscrimination references must be incorporated into all non-exempt Federal-aid bid proposals, construction contracts/subcontracts.		
Non-segregated facilities (FHWA-1273 Sec III)	Title VI 23 CFR 633A 41 CFR 60.1.8	Applicable to all contract and subcontracts of \$10K or more. Include certification in bid document.		
Equipment Rental Rates	FAPG NS 23 CFR 635.120	Develop procedure based on 48 CFR 31 and include in bid document or use TXDOT/Grantor's specifications for equipment rental rates.		
FHWA Final Rule on Temporary Traffic Control Devices	23 CFR 630 Subpart K. 23 CFR 630.1008(d)	Adopt TXDOT/Grantor's program or submit an alternate for approval. Include bid items for traffic control features and operations, and if used, law enforcement in the bid documents. If law enforcement is used, ensure they have the required training.		
Form FHWA 1273	23 CFR 633	Must be included verbatim in all contracts and subcontracts.		
Liquidated Damages	23 CFR 635.127	Develop rates and include in bid document. Include contract provision for assessing damages.		

Lobbying Certification	49 CFR 20 23 CFR635.112(g)	Include certification form in bid document.		
Local hiring Preference	23 CFR 635.117	Bid document may not include any local hiring preferences.		
Materials	23 CFR 630.205 23 CFR 636B	Plans and specifications must describe construction requirements in sufficient detail to facilitate construction. Solicitations for design-build projects describe evaluation factors, which may include particular material quality requirements or design performance criteria (i.e., pavement design life).		
Method of Construction (or Method of bidding)	23 CFR 635.104	Must be by competitive bidding except as supported by public interest finding and approved by TXDOT/Grantor or for design-build projects, include language in RFP outlining selection criteria based on technical qualifications and cost.		
Non-collusion Statement	23 CFR 635.112	Include certification in bid document.		
Non-discrimination against Persons with Disabilities	Several, see actual section.	Ensure all new and existing facilities are designed and constructed to comply with the provisions of all cited statutes. Request reviews and final inspection from TDLR. Implement ADA Program. (***)City wide – check project / grant specific requirements if any (***)		
Non-resident Bidder and Texas Preference	23 CFR 635.110(b) 23 CFR 635.110(f)(1) Government Code 2252.002	If Federal funds are used, don't use any procedures which prohibit consideration of a bid by a non-resident of the state. Also, for design-build projects don't use any procedures that give geographical preferences. If no Federal funds are used, don't award a contract to a non-resident bidder unless the nonresident bidder underbids the lowest resident bidder by a reciprocal percentage.		
Non-responsive bid	23 CFR 635.112	Include definition of a responsive bid and list of reasons for a bid being considered non-responsive in bid document.		
Patented/Proprietary Products	23 CFR 635.411	Develop public interest finding if such materials are specified in bid document.		
Prequalification	23 CFR 635.110	Submit qualifying / licensing procedures to TXDOT/Grantor for approval. Include approved provisions in bid document.		
Prevailing Minimum Wage	Davis Bacon Act Copeland Anti-Kickback Act 23 USC 113 23 CFR 633A 40 USC 276a &c 23 CFR 635.309f 29 CFR 1,2,3	Include appropriate wage rates in bid documents and contract. <i>(Latest version of COA Standard Specs. Section 00830. For example, the revised 00830HH must be used on federally-funded solicitations for bid opening on or after January 14, 2013.)</i> For the latest version of Section 00030 and rates, please contact: CMD Wage Compliance (<i>Outlook Address Book , All Groups</i>)		
	TX Govmt. Code Chapter 2258	Include appropriate wage rates in bid document in accordance with state statute.		
Prison Produced	23 CFR 635.417	Develop contract language to prohibit the use of		

Materials		convict-produced materials and include in bid document.		
Publicly-owned Equipment	23 CFR 635.106	Do not allow in contract. Publicly owned equipment should not normally compete with privately owned equipment on a project to be let to contract.		
Retainage	49 CFR 26.29 Transportation Code 223.010 TX Govmt. Code Chapter 2251.022	Do not keep retainage unless subcontract work is incrementally accepted. A vendor who receives payment from a governmental entity shall pay a subcontractor the appropriate share of payment not later than the 10 th day after the date the vendor receives the payment (Government Code Chapter 2251.022)		
Safety: Accident Prevention (OSHA) Safety, Health & Sanitation	23 CFR 635.108 OSHA	Protect the life and health of employees on the job, the safety of the public and protect property in connection with the performance of the work covered by the contract. Include provisions in contract to implement OSHA. This is implemented in Section VIII of Form FHWA-1273.		
Drug & Alcohol (FTA) (Transportation Projects)	49 CFR 655 Prevention of Alcohol Misuse and Prohibited Drug Use in Transit Operations	Implementation of programs by employers that receive financial assistance by the FTA and by contractors of those employers, that are designed to help prevent accidents, injuries, and fatalities resulting from the misuse of alcohol and use of prohibited drugs by employees who perform safety-sensitive functions. Contractors performing safety sensitive services are required to have a drug and alcohol testing program. The ultimate goal of the program is promoting the riding public's health and safety by eliminating illegal drug use and alcohol misuse by safety-sensitive employees. A grantee shall ensure that the recipients of funds comply with 49 CFR 655. a) A recipient may not be eligible for Federal financial assistance if a recipient fails to establish and implement an anti-drug and alcohol misuse program as required by 49 CFR 655. Failure to certify compliance with these requirements may result in suspension of grantee's eligibility for federal funding. b) A recipient is subject to criminal sanctions and fines for statements and misrepresentations c) A recipient of FTA financial assistance shall annually certify compliance.		
State or Local Preference	23 CFR 635.409	Do not allow in contract.		

Subcontracting	<p>23 CFR 633 23 CFR 635.116</p> <p>FHWA- 1273 VI Subletting or Assigning the contract</p>	<p>Contractors are required to include Form FHWA-1273 in all subcontracts.</p> <p>Contractors must perform at least 30% (check - 50% is shown in e-CFR) of the work on a contract. <i>(Specialty items may be performed by subcontract and the amount of any such specialty items may be deducted from the total original contract price before computing the amount of work required to be performed by the contractor's own organization.)</i></p> <p>Subcontractors are not allowed to perform work until the subcontract has been approved in writing by the contracting entity. Written consent will be given only after the contracting agency has assured that each subcontract is evidenced in writing and that it contains all pertinent provisions and requirements of the prime contract.</p> <p>The 30% self-performance requirement is not applicable to design-build contracts; however, the contracting agency may establish a minimum percentage of work that must be done by the design-builder. For the purpose of this section, the term design-builder may include any firms that are equity participants in the design-builder, their sister and parent companies, and their wholly owned subsidiaries.</p> <p>No procedure, requirement or preference shall be imposed which prescribes minimum subcontracting requirements or goals other than those necessary to meet the DBE program requirements.</p>		
Termination of Contract	23 CFR 635.125	<p>Develop contract language for termination for cause, convenience, and default and include in bid document.</p> <p>Confirm COA's standard language w/ grantor. If additional grant / project specific language is needed, secure COA Law Dept. approval <u>prior to amending 00700 General Conditions.</u></p>		
Time Extensions	23 CFR 635.121	Include reasons time extensions are allowed in specifications.		
Equal Employment Opportunity	<p>Title VI</p> <p>49 CFR Part 21</p> <p>23 CFR Part 200</p> <p>TAC Title 43 §9.4</p>	Provide methods of administration to ensure compliance Title VI and remedy any existing compliance problems.		
Trench Safety	<p>Health and Safety Code 756.022</p> <p>Health and Safety Code 756.023</p>	Include the required provisions in the bid documents.		
Warranties and Warranty Clauses	23 CFR 635.413	Provide TXDOT/Grantor with procedures to be used and include TXDOT/Grantor approved procedures in bid document.		

Grant / Project Specific	Grant Specific – per state & federal laws, Grant Agreement, Grantor’s rules and policies, etc.	As needed		
		<ul style="list-style-type: none"> ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ 		

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Project: _____ **Date:** _____

B. Letting and Award - Federal and State Requirements			
Requirement	Reference	City Responsibility (Check if Applicable)	√
Addenda	23 CFR 635.112	<p>Obtain the approval of TXDOT / Grantor prior to issuing addenda which result in major changes to the solicitation document.</p> <p>Provide assurance that all offerors have received all issued addenda.</p> <p>NOTES: Minor addenda need not receive prior approval but may be identified by the grantee at the time of or prior to requesting the grantor's concurrence in award. TXDOT's definition of "Minor" addenda includes minor quantity changes and correction of obvious errors, but does not include changes to geometric features, approved specifications or safety appurtenances. (***) <i>Advising TXDOT/Grantor of any proposed addenda before release to prospective bidders/offerors is recommended to avoid potential participation issues.</i> (***)</p>	
Advertising	23 CFR 635.112 Government Code §2155.083 Transportation Code §223.002 Local Government Code 252.041 (municipalities) Local Government Code 262.025 (counties)	<p>Must be after TXDOT/Grantor authorization. No work shall be undertaken on any federal-aid project, nor shall any project be advertised for bids prior to authorization by TXDOT/Grantor.</p> <p>Minimum 3 weeks in advance of bid opening. The advertisement and approved plans and specifications shall be available to bidders a minimum of 3 weeks prior to opening bids except that shorter periods may be approved by the grantor in special cases when justified.</p> <p>Advertise the place and time bids are to be opened and read.</p> <p>Cities and counties should consider placing a notice on the Comptroller's internet site (Electronic State Business Daily) a minimum of 21 days prior to bid opening.</p> <p>Newspaper advertisements must be placed at least two weeks prior to bid opening and run each week.</p>	
Bid Analysis and Contract Award	23 CFR 635.114	<p>Evaluate bids.</p> <p>Determine lowest responsible / responsive bidder.</p> <p>Consider alternate bid items, if used.</p> <p>Establish low bid criteria if add alternates are used.</p>	
	Transportation	Award, if made, must be to lowest bidder.	

	Code Chapter 223.0041	Forward bid tabulations and engineers estimate along with award recommendation to TXDOT/Grantor. Final award cannot be made without TXDOT/Grantor concurrence.		
Bid Opening and Tabulation	23 CFR 635.113	Describe procedure to insure bids are opened and publicly read at time and location listed in advertisement.		
	Transportation Code §223.004	All bids must be sealed, filed with the City and opened in a public meeting. Bidders may not be prohibited from attending the public meeting. All bids must be opened in the presence of the meeting attendees.		
Distribution of Bid Documents	CFR 635.112	Minimum 3 weeks prior to date of letting.		
Nonresident bidder	Government Code Chapter 2252.002	In those instances where the low bidder is a nonresident, contact the home state of the bidder to determine if any nonresident bidder preferences are applied. If so, then the same preferences will be reversed to apply in Texas. (Not applicable to projects involving federal funds).		
Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)	49 CFR 26	Review DBE participation to ensure contract goals are satisfied in accordance with provisions contained in the bid document prior to contract award. ***Secure SMBR approval.***		
	Texas Administrative Code §9.55	Review SBE participation to ensure contract goals are satisfied in accordance with provisions contained in the bid document prior to contract award. ***Secure SMBR approval.***		
Grant / Project Specific	Grant Specific – per state & federal laws, Grant Agreement, Grantor’s rules and policies, etc.	As needed ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____		

Project: _____ **Date:** _____

C. Contract Execution - Federal and State Requirements				
Requirement	Reference	City Responsibility (Check if Applicable)	<input checked="" type="checkbox"/>	
Federal-Aid Assurances	Form FHWA 1273 23 CFR 633	Must be included verbatim in all contracts and subcontracts. <ul style="list-style-type: none"> ○ COA Section 00630 Nondiscrimination Certificate (all projects); ○ COA Section 00631 Title VI Assurances Appendix A (all projects); ○ COA Section 00810A Standard Federal-Aid Assurances w/ latest form FHWA 1273 (federally-funded projects only) 		
Bonding & Insurance	Government Code §2253.021 Transportation Code §223.006	Performance bonds required if the contract is in excess of \$100,000. Payment bonds required if the contract is in excess of \$25,000 (\$50,000 for municipalities) Other: Granting agency as additional insured?		
Workers' Compensation Insurance	Labor Code §406.096	Ensure the contractor has filed the required certificate of insurance prior to contract execution.		
Railroad Insurance Provisions	23 CFR 646.107 23 CFR 646.216	Ensure that contractor has submitted the required insurance. Ensure that railroad agreement has been executed prior to contract execution.		
Child Support Documentation	Family Code §231.006.	Collect names and social security numbers of all individuals owning 25% or more of company awarded the contract.		
Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)	49 CFR 26	Review DBE participation to ensure contract goals are satisfied in accordance with provisions contained in the bid document prior to contract execution. ***Secure SMBR approval.***		
	Texas Administrative Code §9.55	Review SBE participation to ensure contract goals are satisfied in accordance with provisions contained in the bid document prior to contract execution. ***Secure SMBR approval.***		
Grant / Project Specific	Grant Specific – per state & federal laws, Grant Agreement, Grantor's rules and policies, etc.	As needed <ul style="list-style-type: none"> ○ _____ ○ _____ ○ _____ 		

Project: _____

Date: _____

D. Contract Administration / Management - Federal and State Requirements			
Requirement	Reference	City Responsibility (Check if Applicable)	√
Americans with Disabilities Act (ADA)	49 CFR 37	Ensure all facilities are in compliance. Secure TDLR reviews and inspections.	
Change Orders	23 CFR 635.120	Develop definition of major / non-major change orders. Secure granting agency approval of definition. (<i>Preferably taken care of before bid</i>) Gain approval of major changes <u>before starting work</u> . Approval of non-major changes can be given later if definition developed and approved by grantor. Have documented cost analysis of negotiated prices.	
Claims	23 CFR 635.124	Develop claims procedure as required and administer in accordance with procedures developed.	
Contractor Purchase of Equipment for City	23 CFR 140 OMB Circular A-87	When a city must purchase equipment to adequately meet the construction engineering requirements of a Federal-aid project, participation in purchase cannot be direct, but must be amortized.	
Convict (Inmate) Labor	23 CFR 635.117	Ensure that the contractor does not use convict labor.	
Differing Site Conditions	23 CFR 635.109	Should such a condition exist, handle in accordance with provisions contained in contract document.	
Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)	49 CFR 26	Monitor progress / good faith efforts through monthly DBE progress reports submitted by the contractor.	
Environmental Protection	23 CFR 450 23 CFR 771 23 CFR 777	Environmental commitments are often made during the planning and design phases. These commitments must be carried forward into the PS&E and construction.	

Equal Employment Opportunity Contract Provisions; Equal Opportunity Clauses	Title VI 23 CFR 633 Executive Order 11246	Physically incorporate Form FHWA 1273 into all nonexempt Federal-aid bid proposals, construction contracts and subcontracts. Also incorporate the equal opportunity clauses pursuant to Department of Labor regulations and by operation of the order.		
Equipment Rental Rates	FAPG NS 23 CFR 635.120	Ensure use of predetermined rate guides. Ensure that contractor does not specify mark-ups.		
False Statements	23 CFR 635.119	Furnish Form FHWA-1022 and ensure it is posted on the project bulletin board.		
Inspection	23 CFR 635.105	Ensure adequate project supervision and inspection to insure that project is completed in conformance with approved plans and specifications.		
Liquidated damages	23 CFR 635.127	Assess in accordance with specifications included in bid document.		
Non-segregated facilities	23 CFR 633 Subpart A	Contractor obtains certification from subcontractors (contained in Form FHWA-1273, Section III [Nonsegregated Facilities]). Visit project site periodically to verify compliance.		
Payrolls	23 CFR 635.118	Obtain payrolls <u>weekly</u> for all contractors and subcontractors. Review for completeness and certification. Retention for subsequent review by TXDOT/Grantor or the United States Department of Labor (USDOL).		
Prevailing Minimum Wage (plus COA's Living Wage)	23 USC 113 23 CFR 633 Subpart A COA Ordinance(s)	Ensure that the contractor is paying the minimum wages as contained in the contract through review of certified payrolls, employee interviews, etc.		
Progress Payments	23 CFR 635.122	Should be based on work completed and may include stockpiled material with certain restrictions.		
	Government Code §2251.021 Texas Constitution – Art. 3 – Sec. 5D	Payment must be made to the contractor within 30 days or interest will accrue. Invoices to TXDOT/Grantor must include appropriate detail.		
Quality Assurance (QA) Program	23 CFR Part 637, Subchapter B FHWA Technical Advisory 6120.3	Adopt TXDOT/Grantor Quality Assurance program or submit a program through TXDOT/Grantor to FHWA that meets requirements of 23 CFR 637B. For design-bid-build projects where the developer (contractor) is responsible for QA tests, the City is to employ an independent lab to verify the developer's (contractor's) QA tests in accordance with FHWA Technical Advisory 6120.3. Assure compliance with approved program. Submit letter of certification to TXDOT/Grantor when construction is complete.		

Retainage	49 CFR 26.29 Transportation Code 223.010 Government Code Chapter 2251.022	Do not keep retainage unless subcontract work is incrementally accepted. If retainage is kept on subcontractors, ensure contractor releases retainage on a subcontractor's work within 10 days after satisfactory completion of all of the subcontractor's work.		
Records	23 CFR 635.123 49 CFR 18.42	Project records must provide adequate assurance that the quantities of completed work are determined accurately and uniformly, and be maintained for a minimum of three (3) years following contract completion and acceptance.		
Safety: Accident Prevention (OSHA)	23 CFR 635.108	Safety provisions are contained in the contract under FHWA-1273. Contact OSHA with any suspected contractor/subcontractor safety violations.		
Salvage Credits	49 CFR 18.36	Follow Texas Facilities Commission rules.		
Specification Compliance	23 CFR 635.105	Follow provisions of agreement with TXDOT/Grantor. Gain TXDOT/Grantor approval of specification changes. Accommodate TXDOT/Grantor inspection. Provide engineering certification of compliance to TXDOT/Grantor.		
Statements and Payrolls	23 CFR 635.118 23 USC 113 40 USC 3141 29 CFR 3.1 29 CFR 5.6(a)(3) 23 CFR 636.119(c)	Include FHWA-1273 in contract. Adopt TXDOT/Grantor monitoring program or submit alternate program for TXDOT/Grantor approval. Monitor compliance according to approved program. <i>(***While COA normally requires monthly payrolls, weekly certified payrolls are required for federally funded projects***)</i>		
Subcontracting	23 CFR 633 23 CFR 635.116	Monitor 30% limitation. Check debarred list for subcontractors. Ensure subcontracts include Form FWHA 1273.		
Supervision and Staffing	23 CFR 635.105	Outline procedure to insure compliance with plans and specifications. Must have full-time person in charge and responsible.		
Termination of contract	23 CFR 635.125	Administer contract terminations in accordance with contract provisions. Gain TXDOT/Grantor concurrence before terminating contract.		

Time Extensions	23 CFR 635.121	Obtain TXDOT/Grantor approval prior to extending contract time.		
Warranties and Warranty Clauses	23 CFR 635.413	Follow procedures previously approved by TXDOT/Grantor and included in the bid document.		
Grant / Project Specific	Grant Specific – per state & federal laws, Grant Agreement, Grantor’s rules and policies, etc.	<p>As needed</p> <ul style="list-style-type: none"> ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ ○ _____ 		

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SECTION 3.2

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Bonding and Insurance

General. City staff must include provisions for bid guaranties or bonds, or warranty bonds in invitations for receipt of bids (IFB). Bonding is grouped into five basic classifications; bid bonds, performance bonds, payment bonds, retainage bonds and warranty bonds.

A **bid bond, or proposal guaranty**, is a bond, certified check, cashier's check or other negotiable instrument which is submitted with the bid as assurance that the bidder will, upon acceptance of his bid, execute such contractual documents as may be required within the time specified.

A **performance bond** is a bond executed in connection with a contract to assure fulfillment of all the contractor's obligations under the contract.

A **payment bond** is a bond executed in connection with a contract to assure payment, as required by law, to all persons supplying labor and material in the execution of the work provided for in the contract.

A **retainage bond** is a bond executed in connection with a contract to assure that any monies owed to the owner by the contractor are recoverable (A retainage bond is used instead of actually withholding a percent of the contractor's payments.), and

A **warranty Bond** is a bond executed in connection with a contract to assure that a warranted item survives the warranty period in the prescribed condition.

Federal Regulations

a. 23 CFR 635.110 – The procurement or contract documents may not contain criteria that restrict competition.

State Regulations

a. Local Government Code 252.044 – A municipality must require the successful bidder to execute a good and sufficient bond. The bond must be executed with a surety company authorized to do business in Texas.

b. Local Government Code 262.032 - A county may require the successful bidder to provide a performance bond. The bid bond must be executed with a surety company authorized to do business in Texas.

c. Government Code 2252.064 – A contractor is required to execute a performance bond issued by a surety company authorized to do business in this state in an amount determined by the contracting state agency, but not to exceed the contract price. (TXDOT only. N/A to RMA or RTA)

d. Government Code 2253.021 – A contractor is required to execute a performance bond if the contract is in excess of \$100,000 and a payment bond if the contract is in excess of \$25,000 (\$50,000 for municipalities).

Required Practices

a. All Texas governmental entities have a statute that requires contractors to execute bonds. The type of the bond may vary, but all provide that the bond be issued by a surety company authorized to do business in Texas. When state or federal funds participate in the contract, TXDOT/Grantor wants assurance that their funds are protected. Accordingly, COA must either adopt TXDOT/Grantor's bonding process or submit their own process for TXDOT/Grantor approval if the project has state funds in any amount.

City Responsibilities

- a. The City must get advanced TXDOT/Grantor approval of procedures to bond contractors.
- b. Include approved procedures in contract documents.
- c. Design-bid-build – For projects with state and/or federal funds, assure bonding provisions are in specifications.
- d. Design-build – For projects with state and/or federal funds, assure that Request for Proposals contain language requiring that the successful proposer provide a performance and payment bond or an alternative form of security.

Buy America

General. All steel and iron products must be of domestic origin. All manufacturing processes must take place domestically. Current regulations require the use of domestic steel and iron in federally funded highway construction. All foreign steel and iron materials and products are covered by Buy America regulations regardless of the percentage they comprise in a manufactured product or the form they may take. The regulations allow bidders and the City some latitude through minimum use, waivers and alternate bids.

As previously mentioned, all manufacturing processes must take place domestically. Manufacturing begins with the initial melting and mixing, and continues through the coating stage. Any process that modifies the chemical content, the physical size or shape, or the final finish is considered a manufacturing process. These processes include rolling, extruding, machining, bending, grinding, drilling and coating. Coating includes epoxy coating, galvanizing, painting, or any other coating that protects or enhances the value of the material.

Buy America does not apply to raw materials (iron ore and alloys), scrap, pig iron or processed, pelletized, and reduced iron ore. Insufficient domestic supplies of raw materials caused FHWA to issue a nationwide waiver allowing foreign source supplies of these items. If domestically produced steel billets or iron ingots are shipped overseas for any manufacturing process, and then returned to the U.S., the resulting product does not conform to the Buy America requirements.

The manufacturing process for a steel/iron product is considered complete when the product is ready for use as an item (e.g., fencing, posts, girders, pipe, manhole cover, etc.) or could be incorporated as a component of a more complex product through a further manufacturing process (e.g., the case for a traffic signal head). The final assembly process does not need to be accomplished domestically so long as the steel/iron component is only installed and no manufacturing process is performed on the steel/iron component.

Example: Shapes produced domestically from foreign source steel billets are not acceptable under Buy America since the initial melting and mixing of alloys to create the steel occurred in a foreign country.

Example: All welding must take place domestically since the welding rod itself is typically an iron/steel product and the welding process substantially alters the rod.

Buy America does not apply to minimal use of iron/steel materials provided that the total cost of all foreign source items used in the project, as delivered to the project site, is less than \$2,500 or one-tenth-of-one-percent (1/10 of 1%) of the contract amount, whichever is greater. If a supplier or fabricator wishes to use a partial fabrication process where domestic and foreign source components are assembled at a domestic location, the "as delivered cost" of the foreign components should include any transportation, assembly and testing costs required to install them in the final product.

For the Buy America requirements to apply, the steel or iron product must be permanently incorporated into the project. Buy America does not apply to temporary steel items (e.g. temporary sheet piling, temporary bridges, steel scaffolding and falsework, etc.) Further, Buy America does not apply to materials that remain in place at the contractor's convenience.

The practice of making otherwise eligible items non-participating for the purpose of circumventing the Buy America requirements is unacceptable and will not be approved. There is no clear-cut rule for resolving an after-the-fact discovery of an inadvertent incorporation of an excess amount of foreign materials into a project. Each situation should be resolved on a case-by-case basis. FHWA retains the authority to resolve all Buy America issues.

Buy America provisions apply to all material incorporated in a Federal-aid project, even if an item is rendered as a "donated material" in accordance with 23 U.S.C. 323 – Donations and Credits. While the City may receive a credit for donated material, this material must generally comply with Buy America.

Waivers. Approval authority for waivers of Buy America requirements is retained by FHWA for all federally funded projects. The FHWA may grant a waiver of the Buy America requirements for specific projects if the City can demonstrate either of the following:

- a. Compliance with the requirements is inconsistent with the public interest; or
 - b. Insufficient quantities of satisfactory quality domestic products are available.
- Materials delivery delay will not be considered as grounds for a waiver. The cost differential between domestic and foreign products is also not grounds for a waiver.

The City may apply for a waiver of the Buy America provisions if it believes that a waiver is warranted. The City must submit the waiver request with supporting information through TXDOT/Grantor to FHWA sufficiently in advance of need to allow time for proper review and action.

Alternative Bidding Procedures. An alternative bidding procedure may be used to justify the use of foreign steel or iron. Under this procedure, the total project is bid using two alternatives: one which is based on foreign source products, and the second, using domestic products. The use of foreign products may be justified if the lowest total bid based on domestic steel or iron products is 25 percent more than the lowest bid using corresponding foreign steel or iron products. The 25 percent differential applies to the total bid for the entire project, not just the bids for the steel or iron products.

Enforcement. The City is responsible for enforcing the Buy America provisions. The contract provisions should require the contractor to provide a definitive statement about the origin of all products covered under the Buy America provisions. An alternate procedure is to use step certification for products. Under step certification, each handler of the product (supplier, fabricator, manufacturer, processor, etc.) certifies that his or her step in the process was domestically performed.

Federal Regulations

- a. 23 CFR 635.410 – All iron and steel products must be of domestic origin. Waivers may be approved by FHWA.
- b. 23 CFR 636.119 Design-build – TXDOT/Grantor must ensure compliance with Buy America regardless of the form of FHWA funding.

State Regulations

- a. Transportation Code 223.045 – A contract awarded by TXDOT/Grantor on the state highway system without federal aid must contain the same preference provisions for steel and steel products that are required under federal law for a federally funded project. There is no specific requirement for other entities to follow this statute.

Required Practices

- a. Projects with federal funds comply with the Buy America statute.
- b. Concessionaire projects administered by TXDOT must comply with TTC 223.045. TXDOT executing an agreement with a concessionaire is considered the same as TXDOT awarding a contract.

City Responsibilities

- a. COA must assure that Buy America provisions are included in all procurement documents for federally funded projects and that the provisions of Transportation Code 223.045 are included in concessionaire projects administered by TXDOT/Grantor. If there is federal funds, the City must prepare any requests for waivers and submit the request through TXDOT/Grantor to FHWA for approval prior to advertisement for receipt of bids.
- b. If there are federal funds or project is awarded by TXDOT/Grantor, the City must include contract provisions that address Buy America included in all procurement documents for federally funded projects.
- c. If there are no federal or state funds and the project is not awarded by TXDOT/Grantor, the City does not have to comply with these provisions.

Change Orders

General. Grantor must approve all changes to the contract. The construction industry recognizes that it is unrealistic to expect that a construction project could be built without deviating from the project plans. Project designers should be diligent and exercise due care in developing the plans. However, there are many peculiarities (e.g., unforeseen site conditions, utility conflicts, changes in the geology, etc.) that can arise during construction and virtually every project should expect changes. Only the construction engineer is in a position to judge the adequacy of project designs and respond to needed changes.

Grantors, like TXDOT, must formally approve proposed major extra work or major changes in the contract plans and provisions before work begins. However, when emergency or unusual conditions justify, the grantor may give advance verbal approval and confirm such approval with formal approval, as soon as practical. Non-major changes and non-major extra work also require formal approval. However, such approval may be given retroactively at Grantor's discretion.

The City, with Grantor concurrence, should establish and document specific parameters for non-major change and non-major extra work. For example, according to TXDOT the definition of a major change is a change that:

- reduces the geometric design or structural capacity below project design criteria (any reduction in geometric design which would normally have required a design exception)
- increases the contract by 25% of the original contract or by \$300,000 whichever is less
- changes project limits
- any change in the Traffic Control Plan (TCP), which reduces the capacity as shown on the plans for the through traffic or the traffic on major cross streets
- settlement of a dispute or
- changes the access on a controlled access highway

Early coordination between the City and Grantor is essential in the review of change orders. There are at least five basic components that Grantors consider during their review of change orders. These considerations are:

- a. Impact on the Original "Scope of the Work". Typically, if the proposed change falls within the previously authorized scope of work, then Federal and State participation follows.
- b. Eligibility. The FHWA is often asked to approve change orders to correct work because of a design or construction engineering error. Federal-aid participation in errors that may reasonably be expected to occasionally occur (despite the exercise of normal diligence) may be justified, as long as the City's carelessness, negligence, incompetence or under-staffing were not contributing factors.
- c. Consultant Design Errors. Federal policy regarding participation in consultant design errors is that the consultant should pay for the cost of the new design, but is generally not held responsible for additional construction costs resulting from such errors, as long as the errors are not a result of gross negligence or carelessness. If gross negligence or carelessness is determined, neither State nor Federal funds can be used to pay for needed design or construction.

- d. Basis of Payment. The City must perform and suitably document the cost analysis for each negotiated work change order. The method and degree of analysis are the City's decision; however, the process should be acceptable to the Grantor. Force account procedures should only be used as a last resort when agreement cannot be reached on the price of a new work item, or when the extent of the work is unknown or of such character that a price cannot be determined to a reasonable degree of accuracy.
- e. Time Extensions. The change order should also provide the time needed to accomplish the work. Contract time extensions granted by the City that affect project costs or liquidated damages shall be subject to the concurrence of the Grantor and will be considered in determining the amount of Federal participation.

Federal Regulations

- a. 23 CFR 635.120 Design-bid-build – All changes to projects on the National Highway System must be approved by the FHWA. TXDOT assumes this responsibility for projects administered under the provisions of the TXDOT//FHWA Stewardship/Oversight Agreement for Design and Construction. The bid documents should include language describing administration of change orders.
- b. Design-build – Since design and construction are performed under the same contract it is not anticipated that change orders for plan errors or omissions would be approved. However, if the Grantor directs changes to a design-build contract after work begins, a change order may be appropriate.

State Regulations

- a. Local Government Code 252.048
 - i. The governing body of the municipality may approve changes.
 - ii. The total contract price may not be increased unless there are available funds.
 - iii. The original contract price may not be increased by more than 25%.
 - iv. The original contract price may not be decreased by more than 25% without the consent of the contractor.
- b. Local Government Code 262.031 – County Commissioner's Court has authority to make changes. The total contract cost may not be increased unless there are available funds.
- c. Local Government Code 271.060 – A governing body may approve change orders if there are available funds.

Required Practices

- a. For all projects on the state system, TXDOT must approve all changes to the types of safety appurtenances, geometric design criteria, and structural design of pavements and structures (including drainage structures) before the City gives the contractor authority to proceed with the change. This policy applies regardless of whether there are state funds in the project.
- b. Changes on all projects with state or federal funds must be approved by Grantor. Failure to coordinate with Grantor before issuing a change order may jeopardize Grantor participation.
- c. For all projects with state or federal funds, Grantor approval of changes will be governed by the type and extent of Grantor funding. Details will be covered in the funding agreement. There are several possible scenarios:

- i. Grantor participates in a fixed amount based on a percentage of the estimated contract cost and additional Grantor funding is not sought.
 1. If the contract price as awarded is less than the fixed amount, Grantor will approve all change orders for participation until their fixed amount is reached. The change orders must be within the scope of the agreement with Grantor. The City should not consider additional work just to “use up” the available funds. Subsequent change orders do not require Grantor approval except as outlined in 3.a.
 2. If the contract price is equal to or greater than estimated, change orders do not require Grantor approval except as outlined in 3.a.
 - ii. Grantor participates in a percentage of the contract and there is an upper limit to Grantor financial participation.
 1. Change orders will require Grantor approval for participation until the upper limit is reached. Subsequent change orders do not require Grantor approval except as outlined in 3.a.
 - iii. Grantor participates in a percentage of the contract and there is no upper limit to Grantor financial participation.
 1. All change orders will require Grantor approval for participation.
- d. For projects with state and/or federal funds, TXDOT follows FHWA Texas Division policy guidance for participation. Participation in change orders is NOT permitted for additional costs for delays in purchasing right-of-way, adjusting utilities, and other delays that are not the responsibility of the contractor. Participation is also not permitted for the cost to correct design errors.
- e. Change orders on projects that are either not on the state system or anticipated to be on the state system and do not have state or federal funds do not need to be submitted to Grantor for approval.
- f. Design-build – Since design and construction are performed under the same contract it is not anticipated that change orders for plan errors or omissions would be approved. However, TXDOT/Grantor may direct changes to a design-build contract after work begins, in which case a change order may be appropriate.

City Responsibilities

- a. TXDOT/Grantor retains approval authority over all change orders and time extensions. This authority also determines Federal participation limits.
- b. The City must submit changes for TXDOT/Grantor approval in accordance with “Required Practices”.

TXDOT/Grantor Responsibilities

- a. For projects with state or federal funds, the Grantor must approve all change orders in accordance with the above policy statements.
- b. For all projects on the state highway system, TXDOT/Grantor must approve all changes to the types of safety appurtenances, geometric design criteria, and structural design of pavements and structures (including drainage structures) regardless of source of funds.
- c. There is no monitoring on projects without state or federal funds off the state system.

Child Support Documentation

General. In accordance with Family Code §231.006, a contractor's bid for a contract must include the name and social security number of the individual or sole proprietor and each partner, shareholder, or owner with an ownership interest of at least 25 percent of the business entity submitting the bid.

The following language must be included in the bid document verbatim:

"Under Section 231.006, Family Code, the vendor or applicant certifies that the individual or business entity named in this contract, bid, or application is not ineligible to receive the specified grant, loan, or payment and acknowledges that this contract may be terminated and payment may be withheld if this certification is inaccurate."

At the time of contract execution and award, the City must collect and maintain a list of all the names and social security numbers of the individuals, partners, shareholders or owners with an ownership interest of at least 25 percent for the successful bidder. If the City determines that an individual or business entity holding a contract is ineligible to receive payment due to ineligibility, the contract may be terminated. In addition if the required certification listed above is shown to be false, the contractor is liable to the City for attorney's fees, the costs necessary to complete the contract, including the cost of advertising and awarding a second contract, and any other damages provided by law or contract.

Federal Regulation

- a. No comparable statute

State Regulation

- a. Family Code 231.006 – Applies to recipients of state funds and state contracts.
 - i. Requires inclusion of a verbatim certification in bid documents.
 - ii. Requires bidders to include the name and social security number of individuals with at least a 25% ownership.
 - iii. Requires collection of the names and social security numbers of certain individuals with the successful bidder.

Required Practices

- a. All projects with federal and state funds must meet statutory requirements.

City Responsibilities

- a. The City must include the certification required by Family Code §231.006 in all bid documents, proposals and requests for proposals, as appropriate.
- b. In addition, the City must collect and maintain the name and social security number of all affected contractor owners of the successful bidder as required by Family Code §231.006.
- c. There is no monitoring on projects without state or federal funds.

Contractor Claims

In this procedure a claim is a continued demand for payment by a contractor if it has been previously denied under the City's normal procedures for change approval. Both the City and the contractor share in the responsibility for claims. Many claims could be avoided if reviews of the contract documents were more thorough, both in preparation of the project and in bidding the project. Problems occur most often when the City rushes a project with incomplete or inadequate plans through the letting process.

If the City is diligent and pursues resolution of a claim through the courts or arbitration boards (including appeals), consulting with and keeping TXDOT/Grantor fully informed throughout the process, Federal funds may participate in the cost of settlement.

Federal funds can participate in interest associated with a claim if three conditions are met:

- ◆ The interest must be allowable by State statute or specification,
- ◆ The interest is not the result of delays caused by dilatory action of the City, State or contractor, and
- ◆ The interest rate does not exceed the rate provided for by statute or specification.

Contractors' attorney fees are not eligible for Federal participation. The basis for this determination is that there is no statutory authority for the payment of attorney fees. However, the City's administrative costs, including attorney fees related to the defense of claims, are reimbursable. Such costs are reimbursable at the same participation rate as the related construction project.

The FHWA / grantors do not participate in anticipated profit because this is in the realm of the contractor's risk.

Government Code Chapter 2001 Subchapter C provides that each party involved in a claim must be afforded an opportunity for a hearing. The City must provide the contractor with a written notice of a scheduled hearing involving a claim within a reasonable time, but not less than 10 days from the scheduled hearing date. Such written notice must include:

- ◆ A statement of the time, place, and nature of the hearing;
- ◆ A statement of the legal authority and jurisdiction under which the hearing is to be held;
- ◆ A reference to the particular sections of the statutes and rules involved; and
- ◆ A short, plain statement of the matters asserted.

Informal disposition of a claim may be made by stipulation, agreed settlement, consent order, or default. **Hearings, if conducted, must be administered by the State Office of Administrative Hearings in conjunction with Government Code §2001.058. or approved equal.**

Federal Regulations

a. 23 CFR 635.124 Design-bid-build – Federal participation is determined on a case-by-case basis to the extent the claim is supported by the facts and is founded in the contract.

b. Design-build – For design-build projects the likelihood of a claim is greatly reduced since the designer is also the constructor.

State Regulations

- a. Government Code Chapter 2001, Subchapter C – Procedures for contested cases. To be followed if the procedures in Transportation Code 201 do not result in satisfactory resolution. Applies to state agencies but not other entities.
- b. Transportation Code 201.112(a) – Allows Commission to establish rules for informal resolution of claims.
- c. Transportation Code 201.112(b) – Allows a person to file for formal resolution under Government Code Chapter 2001 if they are dissatisfied with the informal process.

Required Practices

- a. Claims on projects with federal or state funds must be approved by Grantor to assure Grantor participation. Failure to coordinate with Grantor before settling the claim will jeopardize Grantor participation. Grantor participation in claims will be governed by the type and extent of Grantor funding. Details will be covered in the funding agreement. There are several possible scenarios:
 - i. Grantor participates in a fixed amount based on a percentage of the estimated contract cost and additional Grantor funding is not sought.
 - 1. If the contract price is less than estimated, Grantor may approve claims for participation until their fixed amount is reached. The claim must be within the scope of the agreement with Grantor. Subsequent claims do not require Grantor approval since Grantor participation limits have been reached.
 - 2. If the contract price is equal to or greater than estimated, claims do not require Grantor approval.
 - ii. Grantor participates in a percentage of the contract and there is an upper limit to Grantor financial participation.
 - 1. Grantor may approve claims for participation until the upper limit is reached. Subsequent claims do not require Grantor since Grantor participation limits have been reached.
 - iii. Grantor participates in a percentage of the contract and there is no upper limit to Grantor financial participation.
 - 1. Grantor must approve all claims for participation.
- b. For projects with state and/or federal funds, TXDOT/Grantor follows FHWA Texas Division policy guidance for participation. Participation in claims is NOT permitted for additional costs for delays in purchasing right-of-way or adjusting utilities. Participation is also not permitted for the cost to correct design errors. Further, claims must be supported by the facts, must have a basis in the contract, and be settled under applicable statutes.
- c. Claims on projects that do not have state or federal funds do not need to be submitted to Grantor for approval.
- d. Design-build – For design-build projects the likelihood of a claim is greatly reduced since the designer is also the constructor.

City Responsibilities

- a. Include language in the contract outlining conditions for which a claim may be filed.
- b. The City must keep TXDOT/Grantor involved in the process of settling claims if they anticipate requesting State or Federal participation in settlement costs.

c. Any hearing associated with a contract claim must be conducted in accordance with Government Code Chapter 2001 Subchapter C. (***) Confirm on individual project basis(***)

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Contract Time

General. The term of the contract is an important part of every construction project. Too little contract time may result in higher construction costs, while too much contract time may encourage inefficiencies, increased user costs, and potentially delays and inconvenience to the public.

The City must have a procedure acceptable to the granting agency for determining contract time. This procedure should include a comparison of the actual construction time against the estimated completion time for several projects to ascertain whether their procedures result in appropriate contract times. The goal should be to strive for the least practical number and least duration of interruptions to users & stakeholders during construction.

Federal Regulation

a. 23 CFR 635.121 – For federally funded projects on the National Highway System, recipients should have adequate procedures for determining contract time.

State Regulation

a. No comparable state statutes specifically address contract time determination. Each entity has broad authority to determine procedures to deliver projects, including methods to determine contract time.

Required Practices

- a. Where required by federal regulations, the City should gain Grantor concurrence that their contract time determination process is adequate. This should occur prior to submission of the PS&E for TXDOT/Grantor approval.
- b. For all other projects, the City may follow local practice.

City Responsibilities

- a. Gain Grantor concurrence in time determination process.
- b. For design-build this is normally one factor in considering proposals.

Debarment Certification

General. Contractors are not allowed to participate in federally funded projects if they are suspended or debarred. The prime contractor is required to certify as to their current eligibility status. Certification is also required of all prospective participants in lower tier transactions. This includes subcontractors, material suppliers, vendors, etc.

Each participant must certify:

"...that it and its principals are not presently debarred, suspended, proposed for debarment, declared ineligible, or voluntarily excluded from covered transactions by any Federal department or agency and that they have not been convicted or had civil judgment rendered within the past three years for certain types of offenses."

The General Services Administration (GSA) has the responsibility to compile, maintain, and distribute the list of suspended and debarred parties that are excluded from all Federal procurement and non-procurement programs. **The GSA discontinued the Excluded Parties List System on November 21, 2012. Exclusions can now be found at www.sam.gov**

Federal Regulation

a. 49 CFR 29 – Contractors and subcontractors that are debarred by any federal agency are prohibited from participating in federally funded projects.

State Regulation

- a. Texas Administrative Code, Title 43 §9.106 – Provides for contractor sanctions by the Executive Director of TXDOT. May include contractors that are debarred by federal agencies. A current list of debarred contractors is listed on the TXDOT web site (pending update).
- b. Government Code 2155.077 – Allows the Texas Building and Procurement Commission to bar a vendor from participating in state contracts.

Required Practices

- a. For all projects, the City must check the current list of debarred contractors and suppliers before awarding any contracts or approving any subcontracts.
- b. Bid documents for federally funded projects must include the verbatim certification required by the regulations.

City Responsibilities

- a. The City should insure that plans and specifications are not furnished to federal suspended or debarred bidders.
- b. The City must include the certification (Form FHWA 1273) in all bid documents for projects with federal funds.
- c. The City must check for the contractor's certification as part of the bid opening process.
- d. Check proposed subcontractors against federal suspended or debarred lists.

Designated Material Sources / Disposal Sites

General. The contractor must furnish all materials to be incorporated into the work. However, the City can either furnish materials or require the contractor to use designated sources of materials under certain conditions. FHWA policy requires that the contractor must furnish all materials to be incorporated in the work, and the contractor shall be permitted to select the sources from which the materials are to be obtained. Exceptions to this requirement may be made when there is a definite finding by the City, with Grantor's concurrence that it is in the public interest to require the contractor to use materials furnished by the City or from sources designated by the City. The exception policy can best be understood by separating City-furnished materials into the categories of manufactured materials and local natural materials.

Manufactured Materials. When the use of City-furnished manufactured materials is approved based on a public interest finding, such use must be made mandatory. The optional use of City-furnished manufactured materials is in violation of Federal policy prohibiting public agencies from competing with private firms. Manufactured materials to be furnished by the City must be acquired through competitive bidding, unless there is a public interest finding for another method with which grantor has concurred.

Local Natural Materials. When the City owns or controls a local natural materials source, such as a borrow pit or a stockpile of salvaged pavement material, the materials may be designated for either optional or mandatory use; however, mandatory use will require a public interest finding and grantor's approval. In order to permit prospective bidders to properly prepare their bids, the location, cost and any conditions to be met for obtaining materials that are made available to the contractor shall be stated in the bidding documents.

Mandatory Disposal Sites. Normally, the disposal site for surplus excavated materials is to be of the contractor's choosing; although, an optional site(s) may be shown in the contract provisions. A mandatory site shall be specified when there is a finding by the City, with the concurrence of the grantor, that such placement is the most economical or that the environment would be substantially enhanced without excessive cost. Discussion of the mandatory use of a disposal site in the environmental document may serve as the basis for the public interest finding.

Summarizing Federal policy for the mandatory use of borrow or disposal sites: Mandatory use of either requires that the City develop a public interest finding and gains grantor's concurrence prior to advertising for receipt of bids. Mandatory use of either may be based on environmental considerations, where the environment will be substantially enhanced without excessive additional cost. Where the use is based on environmental considerations, the discussion in the environmental document may be used as the basis for the public interest finding.

Factors to justify a public interest finding should include such items as cost effectiveness, system integrity and local shortages of material.

Federal Regulation

a. 23 CFR 635.407 – Use of materials made available by a public agency.

- i. Contractors must be permitted to select sources of materials. One exception is when there is a determination that it is in the public interest to require use of material from designated source.
- ii. Material that meets specification requirements may be made an optional source without a public interest determination.
- iii. Except for natural materials, designated materials must be acquired by competitive bidding as a condition of federal participation. Other procurement methods may be approved if there is an approved public interest determination.

State Regulation

- a. No comparable statute.

Required Practices

- a. For all federally funded projects and all projects on the state highway system, TXDOT/Grantor approves all specifications for materials to be incorporated in the project regardless of funding source. This approval includes any mandatory materials sources and required disposal sites.
- b. For projects off the state highway system that do not have any federal or state funds, the City may follow their own practices for material quality and sources.

City Responsibilities

- a. If the City wants to furnish material to a contractor, designate a source of material for the contractor, or require the contractor to use designated disposal sites, the City must make a formal finding that it is in the public's interest to do so.
- b. The public interest determination must have grantor concurrence.
- c. Submit materials specifications to grantor for approval, including any designated source

Differing Site Conditions

General. In accordance with federal regulations, differing site or changed condition clauses must be included verbatim in the contract. Due to the nature of construction and the conditions under which work is performed, designers cannot always accurately determine and describe the conditions existing at project sites. Consequently, actual conditions encountered during construction may differ from those indicated in the contract documents, resulting in a change in construction costs. Also, situations may develop during construction that require the City / contracting agency to order the contractor to slow down or stop construction through no fault of the contractor. These slowdowns or stoppages in the work may cause a change in construction costs.

There also may be situations encountered during construction that require the contracting agency to make alterations to the design. In addition to changing the amount of contract work, such alterations could significantly affect the contractor's production costs.

In theory, the use of the standardized changed condition clause takes the risk of differing subsurface conditions out of the bidding process. Bidders need not consider the cost and difficulty of taking their own borings and compare that with the risk of a differing site condition. They need not consider the amount of a contingency to be included in the bid. Theoretically, with a standardized changed condition clause, contractors will receive no windfalls nor suffer a disaster from a changed condition. The owner will benefit from more competitive bidding as the bidders will not inflate costs for risks that may not happen. And finally, the use of the standardized changed condition clause is meant to provide uniformity across state lines.

The standardized changed condition clauses in 23 U.S.C. 112(e) must be included verbatim in all contracts. The regulation requires the use of three different clauses:

1. Differing Site Conditions Clause - This clause provides for the adjustment of the contract terms if the contractor encounters:

- Subsurface or latent physical conditions that differ materially from those indicated in the contract, or
- Unknown physical conditions of an unusual nature that differ materially from those ordinarily encountered and generally recognized as inherent to the work.

2. Suspensions of Work Ordered by the Architect/Engineer [City] - This clause provides for the adjustment of the contract terms if the performance of all or a portion of the work is suspended or delayed by the City, in writing, for an unreasonable period of time (not originally anticipated, customary, or inherent to the construction industry). The contractor is required to submit a request for adjustment, in writing, to the Engineer [City] within seven calendar days of receipt of the notice to resume work. **Recovery of profit on costs resulting from suspensions of work is not allowed.**

To qualify for an adjustment, suspensions must be for unreasonable periods and do not include brief, customary suspensions for reasons inherent to the construction (i.e., material sampling and testing; approval of shop drawings, material sources, etc.; and other reasonable and customary suspensions necessary for the supervision of construction by the contracting agency). In addition, an adjustment under this clause is not allowed if the work is suspended for other reasons or if an adjustment is provided for, or excluded, under other terms or conditions of the contract.

3. Material Changes in the Scope of the Work - This clause provides for the adjustment of the contract terms if the Architect/Engineer [City] orders, in writing, an alteration in the work or in the quantities that significantly change the character of work. The term "significant change" shall be construed to apply only to the following circumstances:

- The altered character of the work differs materially from that of the original contract, or
- A major item of work, as defined in the contract, is increased or decreased by more than 25 percent of the original contract quantity (adjustments shall apply only to that portion in excess of 125 percent of original contract quantity, or in case of a decrease, to the actual quantity performed).

This clause provides for adjustments resulting from formal change orders by the Engineer, in writing, to the extent that the impacted work is part of the contract. Both parties may initiate an adjustment and both must be in agreement before the work is performed. As with the suspension of work provision, this clause does not preclude the recognition of constructive suspensions or delays.

Federal Regulations

a. 23 CFR 635.109 Design-bid-build

i. Requires specific language be incorporated verbatim into all construction contracts.

The language covers: 1) differing site conditions, 2) suspensions of work ordered by the engineer, and 3) significant changes in the character of work. There are provisions for alternate language.

ii. A non-regulatory supplement to 23 CFR 635 Subpart A advises that the "differing site condition" clause must be made part of the contract unless prohibited by state law.

b. 23 CFR 635.109(c) Design-build – Administering agencies are strongly encouraged to use “suspensions of work ordered by the engineer” clauses and may consider “differing site conditions” and “significant changes in the character of work” clauses appropriate for the risks and responsibilities shared with the private entity.

State Regulations

a. Local Government Code 271.195.(1)(B) – On design-build projects the local government assumes the risks and costs associated with unknown or differing site conditions unless otherwise provided for in the request for proposals and final contract.

Required Practices

- a. For all projects with federal or state funds, the City will be required to follow the same procedures as for federally funded projects. This language minimizes risk to both the contractor and the administrator of the contract.
- b. For projects with no state or federal funds, use of this language is not mandatory.

City Responsibility

- a. For design-bid-build projects, ensure that the contract language contained in CFR 635.109 is included verbatim in the bid document.
- b. For design-build projects, consider using applicable clauses appropriate to relative risk of all parties.

DRAFT

Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses (HUB), and Small Business Enterprises (SBE)

General. The DBE Program is the U. S. government's response to lack of diversity in the construction industry.

All Federal-aid projects are subject to the DBE requirements. The FHWA has determined that municipalities must operate under TXDOT's DBE program even if they have their own program already approved by the US Department of Transportation (USDOT). USDOT must approve each State's DBE program and its annual goals to ensure compliance with all DBE Program requirements.

By regulatory definition, a DBE is "... a for-profit small business concern" (1) That is at least 51 percent owned by one or more individuals who are both socially and economically disadvantaged or, in the case of a corporation, in which 51 percent of the stock is owned by one or more such individuals; and (2) Whose management and daily business operations are controlled by one or more of the socially and economically disadvantaged individuals who own it".

The DBE participation requirements in Federal-aid highway contracts are contract provisions like any other contract provisions and should be administered as such. DBE administrative issues that will require review and attention may arise during a project. These issues will require the City to have an adequate background of the DBE Program. The PM and/or CM should solicit the advice of the City's Small and Minority Business Resources (SMBR) department in resolving these issues as needed.

DBE Specifications and contract provisions include the following:

- ◆ Memorandum of Understanding (MOU)
- ◆ DBE Program Policy
- ◆ Definitions
- ◆ DBE Contract Goal
- ◆ Eligibility Criteria
- ◆ Good Faith Effort Provisions
- ◆ DBE Obligations
- ◆ Commercially Useful Function (CUF)
- ◆ Sanctions on Failure to Comply with DBE Requirements
- ◆ Determination Procedures on Counting DBE participation towards the DBE Goal
- ◆ Award Documentation and Procedures
- ◆ Post Award Compliance Provisions
- ◆ Records and Reporting Requirements

***** COA Ordinance & Rules already include all these. Confirm TXDOT / FHWA approval.*****

The US DOT on February 2, 1999 published in the *Federal Register* (Federal Register / Vol. 64, No. 21 / Tuesday) its final rule, 49 CFR Part 26, entitled "*Participation by Disadvantaged Business Enterprises in Department of Transportation Programs*". This final rule became effective on March 4, 1999. This rule implements a requirement that all Federal agencies "narrowly tailor" their affirmative action programs to "meet a compelling Government interest". The final rule contains a number of significant changes to the DBE program. Some of the more significant changes are described below.

- ◆ The rule changed the way recipients (any contracting agency receiving funds under the USDOT) set and attain DBE goals. Transportation agencies (including Cities) must set their goals based on local evidence of the actual availability of qualified DBEs.
- ◆ The City must provide for a public participation process in establishing their overall goals. Once goals are established, cities must maximize race-neutral methods, such as technical assistance and outreach, to meet as much of their overall goals as possible, the remainder of the overall goal will be met through race-conscious measures such as contract goals. All contracts should be individually reviewed and evaluated for the DBE goal standards and applicability. In some instances a project may justify a zero goal given the external or contributing factors
- ◆ To participate in the DBE program a businesses must not exceed small business size standards or individuals must not exceed \$750,000 personal net worth cap. To be seen as a small business, a firm must meet SBA size criteria as defined by current size standard(s) found in 13 CFR part 121 AND average annual gross receipts as defined by SBE regulations (see 13 CFR 121.402)
- ◆ **One-stop shopping certification programs are to be established in Texas so that businesses may obtain certification as a DBE to apply for contracts in highway, transit and airport agencies. The Texas Unified Certification Program (TUCP) came into effect in October 2002. The Texas Unified Certification Program is a certification process for the Federal Disadvantaged Business Enterprise (DBE) Programs in Texas. A business' DBE certification is valid at any Texas entity that receives U.S. Department of Transportation (DOT) funds and has a DBE Program. (***)CHECK(***)**
- ◆ Contractors will not be penalized if they fail to meet contract DBE goals as long as they follow the good faith effort (GFE) guidelines in 26.53, Appendix A and submit their GFE to their appropriate District DBE Coordinator (DDC) for review, guidance and approval.
- ◆ Contractors who fail to meet DBE goals and fail to make a good faith effort may be penalized. The penalty may consist of the
 - termination of the contract,
 - deduction of the dollar amount of DBE goal not accomplished,
 - or such other remedy or remedies as deemed appropriate.

Federal Regulations

- a. 49 CFR Part 26 Design-bid-build – The DBE program may not restrict competition or provide in-state or other local preference.
- b. 23 CFR 635.107(b) Design-build – The provisions of 49 CFR Part 26 and the receiving agency’s approved DBE plan applies. If DBE goals are set, DBE commitments above the goal must not be used as a proposal evaluation factor in determining the successful proposer.

State Regulations

- a. Texas Administrative Code, Chapter 43, §9.54 – Requires that TXDOT establish overall HUB participation goals and assign individual project goals to achieve overall goal. Note that the Comptroller of Public Accounts (CPA) certifies HUBs and provides that the CPA recognize some TXDOT-certified DBEs as HUBs. Requires that provisions addressing HUBs be included in TXDOT contracts funded entirely with state and local funds. Does not apply to contracts with federal funds.
- b. Texas Administrative Code, Chapter 43, §9.55 - Requires that TXDOT establish annual SBE contracting goals. Notes that the TXDOT maintains an SBE directory and provides that TXDOT certified DBEs and HUBs also meet SBE requirements without having to apply for SBE eligibility. Allows provisions addressing SBEs be included in TXDOT/Grantor contracts funded entirely with state and local funds. The SBE requirements do not apply to contracts with federal funds.
- c. Texas Government Code 2161 – Historically Underutilized Business (HUB) program applicable to state agencies and institutions of higher learning. Includes certification of HUBs and maintenance of a directory of certified HUBs. Does not apply to local or other entities.
- d. Texas Government Code 2252 Subchapter E – Defines general requirements for a contractor (including a subcontractor) claiming status as a Disadvantaged or Historically Underutilized Business. Applies to all agencies and entities. No language concerning requirements for agencies to consider DBEs or HUBs in contract administration.
- e. Texas Transportation Code 201.702 – Requires that TXDOT set goals for awarding state or federally funded contracts to disadvantaged businesses. The goals must approximate the federal requirement for federal funds.
- f. Texas Transportation Code 366.184 – Requires that Regional Tollway Authorities set goals for disadvantaged businesses consistent with general law.
- g. Texas Transportation Code 370.183 – Requires that Regional Mobility Authorities set goals for disadvantaged businesses consistent with general law.

Required Practices

- a. Cities / Grantees must use the most current version of TXDOT/Grantor DBE special provisions for federally funded projects.
- b. For projects with state funds, the City will be required to follow the provisions of Transportation Code 201.701 and Texas Administrative Code, Chapter 43, §9.54 (HUB) and §9.55 (SBE). The City must submit project goals to TXDOT/Grantor for approval before advertising for receipt of bids. Contractors must select DBEs, HUBs, and SBEs from TXDOT/Grantor-approved or maintained sources. The City will report final accomplishments to TXDOT/Grantor for credit to overall program goals.
- c. For projects with no state or federal funds and not falling on the State or Federal highway systems, the City should follow their own local or specific ordinances and procedures. Cities are

encouraged to use DBEs, HUBs, and SBEs from TXDOT/Grantor approved or maintained sources. The City must also report final accomplishments to TXDOT/Grantor for credit to overall project goals.

City Responsibilities

- a. The City must adopt TXDOT/Grantor’s approved DBE program.
- b. Establish project goal and include in bid document.
- c. Include DBE provisions in bid document.
- d. Ensure DBEs are certified under the appropriate Certification Program.
- e. Review DBE participation to ensure contract goals are satisfied in accordance with provisions in the bid document prior to contract award.
- f. Monitor progress during construction to assure goal is met or good faith efforts are made.
- g. For design-build projects, in addition to the above, do not consider commitments in excess of the specified goal in the evaluation of proposals.

DRAFT

Equal Employment Opportunity

General. The City, as a contracting agency, has a responsibility to ensure that all Federal-aid contractors, subcontractors, vendors, and material suppliers do not discriminate in employment and contracting practices based on race, color, religion (in the context of employment), sex, national origin, age or disability.

As a recipient of federal funds, the City has the responsibility to ensure that required equal opportunity requirements are included in direct federal and federal-aid contracts and that contractors are in compliance with those requirements under the City's authority.

A contractor's minimum equal opportunity requirements are set forth in the Required Contract Provisions Federal-aid Construction Contracts (FHWA-1273) and are applicable to contractors and subcontractors who hold Federal or Federal-aid contracts of \$10,000 or more. This is a standard document containing required federal EEO contract provisions and proposal notices physically required to be incorporated in each direct federal and federal-aid highway construction contract and subcontract (at any tier) of \$10,000 or more.

Grantors impose specific nondiscrimination and affirmative action obligations on contractors relating to their employment practices under the following authorities:

Federal Regulations

- a. Title VI of the Civil Rights Act of 1964
- b. The Civil Rights Restoration Act of 1987
- c. The Age Discrimination Act of 1973
- d. The Rehabilitation Act of 1973
- e. 23 U.S.C. Section 140-324
- f. 49 CFR Part 21: Nondiscrimination in Federally-Assisted Programs of the Department of Transportation
- g. 23 CFR Part 200: Title VI Program and Related Statutes – Implementation and Review Procedures
- h. 23 CFR Part 230: FHWA External Program Regulations
- i. 23 CFR Section 1.9 and 1.36
- j. 23 CFR Section 635.117(d) and (e): Labor and Employment
- k. Form FHWA – 1273
- l. FHWA Order 4710.8: Clarification of FHWA and State Responsibilities under Executive Order 11246 and Department of Labor Regulations in 41 CFR Chapter 60

State Regulations

- a. Texas Administrative Code, Title 43 §9.4 – Requires TXDOT/Grantor to monitor recipients of federal funds for Title VI activities.
- b. Texas Labor Code, Title 2, Subtitle A, Chapter 21, Subchapter B – Prohibits employer discrimination on the basis of race, religion, sex, color, national origin, age or disability.

Required Practices

- a. To effectuate a sound and effective Equal Opportunity Contractor Compliance Program on Federal and Federal-aid projects, there must be cooperation, coordination and communication between the major partners: For example, the Federal Highway Administration (FHWA), Texas Department of Transportation (TXDOT), the Local Government (City), and the contractor(s). Each partner has a critical role to play and responsibility to ensure that Federal Equal Employment Opportunity, nondiscrimination, and Equal Opportunity objectives are achieved.
- b. The contractor has a fundamental role and responsibility to take all reasonable and necessary steps to ensure that the equal opportunity terms and conditions of its contract are fully met. This includes but is not limited to its employment policy and its selection and retention of subcontractors, material suppliers and vendors void of discrimination. The contractor is responsible for having in place and implementing an equal opportunity policy that ensures equal access to employment, training, and business opportunities to minorities and women.
- c. The contractor is required to fully cooperate with the City and grantor in meeting the EEO requirements of the Federal and federally assisted contracts including providing ready access to all files and records and submitting all required and requested reports to assist them in determining compliance.
- d. All entities will ensure compliance with applicable provisions of the Civil Rights Act.

City Responsibilities

- a. Adopt grantor's EEO program or submit alternate program proposal for approval.
- b. Include federal EEO requirements language in bid document.
- c. In accordance with 23 CFR Part 230 and Form FHWA-1273, the City must ensure that all Federal-aid construction contractors and subcontractors with contracts of \$10,000 or more do not discriminate and will take affirmative action to assure equal employment opportunity for all persons attendant to the contract. To assure nondiscrimination, the City must do the following:
 - i. Ensure all contractors and subcontractors accept the following as their operating EEO policy verbatim: "It is the policy of the Company to assure that applicants are employed, and that employees are treated during employment, without regard to their race, religion, sex, color or national origin, age or disability. Such action shall include: Employment, upgrading, demotion, or transfer; recruitment or recruitment advertising; layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship, pre-apprenticeship, and/or on-the-job training."
 - ii. Ensure that all contractors and subcontractors designate and identify an EEO Officer.
 - iii. Ensure that all contractor and subcontractor personnel authorized to hire, supervise, promote and discharge employees are fully cognizant of, and will implement, the EEO policy.
 - iv. Ensure that all contractors and subcontractors, when recruiting for employees, include in all advertisements for employees the notation: "An Equal-Opportunity-Employer" Contractors and subcontractors must also implement additional recruitment efforts such as utilizing public and private employee referral services and employee referrals.

- d. Monitor contractor compliance with program
- e. Ensure that the contractor displays the following federal posters and notices on project-site bulletin boards.
 - i. Equal Opportunity is the Law required by 41 CFR 60-1.4(b)(1)
 - ii. EEOC-P/E-S (Spanish Version)
 - iii. Contractor's EEO Policy statement required by Form FHWA-1273-EEO officer name and phone number.
- f. Ensure that all contractors and subcontractors submit annually, FHWA Form-1391 reflecting the racial and gender utilization of their workforce on their federal-aid highway construction projects. The report is a summary of laborers on their last payroll period before the end of July. The form is submitted each August for projects under construction during the month of July. The City keeps copies of the forms in its respective project file. The City forwards the reports to the appropriate granting agency. (i.e. TXDOT's Office of Civil Rights)
- g. Provide technical assistance and training to contractor. This can consist of meeting with individual contractors to provide "one-on-one" assistance on developing an effective EO/EEO program or more specific areas such as recruiting and hiring minorities and women.

The City, and contractors are required to maintain a copy of the Form 1391s for a period of three years past the project completion date.

Equipment Rental Rates

General. Federal regulations address participation in equipment owned or rented by the contractor and used in force account work. Specified cost accounting principles must be used to develop the rates. In 1986, an Office of the Inspector General (OIG) audit of rental rates found that a significant number of contractors were being reimbursed for equipment usage based on rates that included ineligible costs. Ineligible costs included use of contingencies, replacement cost escalator factors, and premium rental rates for rental periods less than one month.

Federal policy requires that actual costs be used to determine extra work payments; however, actual equipment costs are usually not readily available. Therefore, the FHWA permits a City to specify the acceptable rate guides in construction contracts. The City may also include any equipment rate schedules developed in conformance with the Federal cost principles and the FHWA policy.

The Federal cost principles applicable to rental rates for contractor furnished equipment are contained in 48 CFR, Part 31. The provisions in OMB Circular 87 apply when City-owned equipment is used. Rental Rate Guides: The City may, subject to grantor concurrence, adopt the Blue Book or other industry rate guide, or it may develop its own guide. The City must make the determination that the equipment rental rates developed or adopted fairly estimate a contractor's actual cost to own and operate the equipment within its jurisdiction.

Grantor must review and approve the City's rates for compliance with the policy before including the rates in a contract proposal.

Adjustment Factors: Equipment is not expected to operate for 12 consecutive months. Maps at the beginning of each Blue Book equipment section indicate adjustment factors based on climate and regional costs. Rate adjustment tables indicate adjustment factors based on equipment age. The adjustment factors in the maps and tables are to be applied when determining the eligible rate.

Maximum Rate: The Blue Book adjusted rates cover all eligible equipment related costs. Therefore, they are considered to be the maximum eligible rates for Federal-aid participation purposes.

Hourly Rates: The developer of the Blue Book accumulates all contractor costs for owning a piece of equipment on an hourly basis. The monthly rate displayed in the rental guide is determined by multiplying the accumulated hourly costs by the monthly standard of 176 hours. Therefore, for periods of equipment use less than the standard 176 hours per month, Federal-aid participation shall be limited to the hourly rate obtained by dividing the monthly rate by 176. Premium rates contained in the rate guides shall not be used.

Standby Equipment Rates: The contractor continues to incur certain ownership costs when equipment is required to be on standby. The use of a standby rate is appropriate when equipment has been ordered to be available for force account work but is idle for reasons

that are not the fault of the contractor. While an industry standard does not exist for standby rates, it has been the normal practice of the courts to reduce published ownership rental guide rates by 50 percent for standby rate usage. Therefore, the FHWA will accept 50 percent of the ownership rental rates of an approved guide as the standby rate in lieu of a contractor's actual standby costs. There should be no operating costs included in the rate used and standby time should not exceed 8 hours per day, 40 hours per week, or the annual usage hours as established by the rate guide.

Mobilization: The costs required to mobilize and demobilize equipment not available on the project are eligible for reimbursement. Standby rates should be used for equipment while being hauled to and from the project. This will be in addition to applicable rates for the hauling equipment. All costs associated with the assembly and disassembly of the equipment for transport should also be considered in the mobilization costs.

Overhead: Equipment overhead includes such items as insurance, property taxes, storage, licenses and record keeping. The Blue Book rates include all equipment overhead costs. Therefore, if a contractor proposes to apply project or home office overhead to a Blue Book rate, the City must assure that it contains no equipment overhead cost factors. TXDOT/Grantor will determine the reasonableness of such a rate.

Profit: There is no provision for equipment rental profit in the Blue Book published rates. Federal regulations do not prohibit the addition of an amount for profit. If the City has a policy for the payment of profit, it should be followed on Federal-aid contracts. If a profit amount is used, grantor will determine reasonableness based on experience.

Contractor Leased Equipment: When a contractor obtains equipment through a third party rental agreement for use in a force account situation, the cost will normally be the invoice cost. The invoice cost should be comparable with other rental rates of the area. The Associated Equipment Distributors (AED) Rental Rate and Specifications may be used to evaluate the costs for such equipment rental. Since rental agreements vary, the specific operating costs included in the rental agreement may need to be determined. The contractor may be reimbursed for additional eligible operating costs not covered by the agreement (i.e., fuel, lubrication, field repairs, etc.); however, equipment standby time will not be reimbursed.

The AED book is not acceptable as a rate guide for contractor owned equipment. The AED rates are based on national averages of rates charged by equipment distributors and do not reflect the contractor's cost of owning and operating the equipment.

Federal Regulation

- a. Non-regulatory Supplement to 23 CFR 635.120 – Equipment Rental Rates
 - i. Requires actual costs be used for extra work payments.
 - ii. Allows predetermined rate guides be used for equipment rates for contractor owned equipment in lieu of actual cost. Blue Book is acceptable guide.
 - iii. Allows reimbursement of reasonable rental cost if contractor leases equipment.

State Regulation

a. Texas Administrative Code, Title 43 CFR 31 – Specifications for projects must conform to TXDOT's Standard Specifications as a condition of state fund participation.

Required Practices

a. Equipment rental rates for all projects with federal or state funds must comply with grantor's standard specifications.

i. Develop rates and submit for TXDOT/Grantor approval if state or federal funds sought for added work.

b. The City may use equipment rental rates in accordance with their own practices if federal or state funds are not sought for the added work.

c. The City may use equipment rental rates for projects with no federal or state funds in accordance with their own practices.

City Responsibilities

a. Adopt TXDOT/Grantor specifications for equipment rental rates or develop procedures based on 48 CFR 31. If the City develops their own rental rates, TXDOT/Grantor must review and approve the rates for compliance with the policy before including the rates in a contract proposal.

TXDOT/Grantor Responsibilities

a. For projects with state or federal funds, ensure that the City advises potential bidders that Blue Book rates will be used for rental equipment in force account work. Verify that force account change orders use Blue Book rates.

b. If the City develops their own rental rates, TXDOT/Grantor must review and approve the rates for compliance with the policy before including the rates in a contract proposal.

c. There is no monitoring on projects without state or federal funds.

FHWA Final Rule on Temporary Traffic Control Devices

General. This Final Rule is intended to reduce the likelihood of fatalities and injuries to road users, and to workers who are exposed to motorized traffic (vehicles using the highway for purposes of travel) while working on Federal-aid highway projects.

Beginning December 4, 2008, the Final Rule will provide new and supplemental regulations concerning the use and payment of uniformed law enforcement officers, positive protection measures between workers and motorized traffic, and temporary traffic control devices on construction, maintenance, and utility work zones. The regulations apply to all Federal-Aid highway projects, but state agencies and municipalities are encouraged to adopt these on other types of projects as well.

Agencies are to establish processes, procedures, and/or guidance to systematically consider the use of the following:

1. Positive protection devices to prevent the intrusion of motorized vehicles into the work space and other hazardous areas of the work zone. The use of positive protection devices must be based on an engineering study. An engineering study may be used to develop positive protection guidelines, or to determine appropriate measures for an individual project. The engineering study should be based on consideration of factors and characteristics such as:

- Project scope and duration,
- Anticipated traffic speeds through the work zone,
- Anticipated traffic volume,
- Distance between traffic and workers, and extent of worker exposure,
- Escape paths available for workers to avoid a vehicle intrusion into the work space,
- Time of day (e.g., night work), Etc.

2. Exposure control measures to avoid or minimize worker exposure to motorized traffic, and road user exposure to work activities. Exposure control measures should be considered to avoid or minimize exposure for workers and road users. Examples of exposure control measures include:

- Full road closures,
- Ramp closures,
- Median crossovers,
- Full or partial detours or diversions,
- Protection of work zone setup and removal using rolling road blocks,
- Performing work at night or during off-peak periods, Etc.

3. Uniformed law enforcement and other traffic control measures to reduce work zone crashes. Each agency, in partnership with the FHWA, shall develop a policy addressing the use of uniformed law enforcement on Federal-aid highway projects.

The policy may consist of processes, procedures, and/or guidance. In general, the need for law enforcement is greatest on projects with high traffic speeds and volumes, and where the work zone is expected to result in substantial disruption to or changes

in normal traffic flow patterns. In addition, if law enforcement is used, they must be trained as required in 23 CFR 630.1008(d). The FHWA offers a course titled “Safe and Effective Use of Law Enforcement Personnel in Work Zones.”

Specific project conditions should be examined to determine the need for or potential benefit of law enforcement, such as the following:

- Frequent worker presence adjacent to high-speed traffic without positive protection devices,
- Traffic control setup or removal that presents significant risks to workers and road users,
- Complex or very short term changes in traffic patterns with significant potential for road user confusion or worker risk from traffic exposure,
- Night work operations that create substantial traffic safety risks for workers and road users,
- Existing traffic conditions and crash histories that indicate a potential for substantial safety and congestion impacts related to the work zone activity, and that may be mitigated by improved driver behavior and awareness of the work zone,
- Work zone operations that require brief stoppage of all traffic in one or both directions, Etc.

4. Safe exit and entry of work vehicles into and out of the work area from the travel lanes. The agency processes, procedures, and/or guidance should also address safe means for work vehicles and equipment to enter and exit traffic lanes and for delivery of construction materials to the work space, based on individual project characteristics and factors.

In addition to the preceding four traffic control considerations, the Final Rule also includes requirements for:

5. Payment for traffic control features & operations. Payment for traffic control features and operations shall not be incidental to the contract, or included in payment for other items of work not related to traffic control and safety. Separate pay items shall be provided for major categories of traffic control devices, safety features, and WZ safety activities. For method-based specs, unit price pay items, lump sum pay items, or a combination thereof may be used. Specs should include provisions to require and enforce compliance with implementation and maintenance of the project TMP and related traffic control items.

6. Traffic Control Quality guidelines. Each agency shall develop and implement quality guidelines to help maintain the quality and adequacy of the temporary traffic control devices for the duration of the project. A level of inspection necessary to provide ongoing compliance with the quality guidelines shall be provided.

Federal Regulations

- a. 23 CFR 630 Subpart K.
- b. 23 CFR 630.1008(d)

State Regulations

- a. No comparable statute.

Required Practices

- a. Requirements of 23 CFR 630 Subpart K applies to all projects with federal funds.

City Responsibilities

- a. Adopt TXDOT/Grantor's program or submit an alternate for approval.
- b. Include bid items for traffic control features and operations, and if used, law enforcement in the bid documents.
- c. If law enforcement is used, ensure they have the required training.
- d. Monitor contractor compliance with program.

TXDOT/Grantor Responsibilities

- a. If the City submits an alternate to TXDOT/Grantor's Temporary Traffic Control program, review the program for compliance with the applicable regulations.
- b. For projects with federal funds, review bid documents for required provisions.
- c. For projects with federal funds, ensure the City maintains the quality and adequacy of the temporary traffic control devices.
- d. There is no monitoring by TXDOT on projects without federal funds. (COA requirements still apply)

Form FHWA-1273

General. The Form FHWA-1273, Required Contract Provisions, is a convenient collection of contract provisions and proposal notices that are required by regulations promulgated by the FHWA and other Federal agencies. The provisions contained in Form FHWA-1273 are generally applicable to all Federal-aid construction projects and must be made a part of, and physically incorporated into, all contracts, as well as all appropriate subcontracts and purchase orders.

The City is not permitted to modify the provisions of Form FHWA-1273. Minor additions covering other requirements may be included in a separate supplemental specification, provided they do not conflict with State or Federal laws and regulations and do not change the intent of the required contract provisions.

Federal Regulation

a. 23 CFR 633 – Required contract provisions must be physically incorporated into all contracts and appropriate subcontracts and purchase orders.

State Regulation

a. No comparable statute.

Required Practices

a. Inclusion of Form FHWA-1273 is not required on projects with no federal funds.

City Responsibilities

a. The City must include Form FHWA-1273 verbatim into all contracts and must insure that the prime contractor incorporates the provisions into all subcontracts and purchase orders.

Note: A Notice was published in the June 25, 2012 Federal Register announcing the availability of revised form FHWA-1273. The form was last revised on March 10, 1994 and several revisions are necessary to update the provisions to the current policy of the FHWA and other Federal agencies. Federal-aid recipients must incorporate the 2012 revised form in new Federal-Aid construction projects no later than August 9, 2012 (projects with bid or proposal opening dates after August 9, 2012). Existing contracts are not affected.

(** Make sure COA's current 810A Standard Federal Aid Assurances is up to date****)**

Liquidated Damages

General. Liquidated damages are required as a means of recovering, at a minimum, construction engineering costs associated with contract time overrun(s) from a contractor. Contract time is an essential element of the contract and it is important that the work be pressed vigorously to completion. The cost to the contracting agency for the administration of the contract, including engineering, inspection and supervision, increases as the contract time increases. Likewise, the project user costs also increase as the completion date of the contemplated facility is extended. The liquidated damages contract provision provides a mechanism for the contracting agency to recover these costs associated with the contract time overrun. TXDOT/Grantor is required to have the City incorporate liquidated damages provisions into their Federal-aid contracts as a condition of the project agreement.

Most of the contracting agencies use a liquidated damage rate schedule based on a range of contract amounts. However, some use a daily rate that is calculated specifically for the particular project. The City is required to develop and maintain its own liquidated damages rates that will cover, as a minimum, the City's average daily construction engineering (CE) costs attributable to a contract time overrun. The rates are subject to verification and approval by TXDOT/Grantor. The City must also review the rate every two years and adjust it if necessary.

In addition to CE costs, the City may include the costs of project-related delays or inconveniences, to the City or to the public, in their liquidated damage provisions. In such cases, costs recovered in excess of the actual CE costs shall be deducted from the construction costs in proportion to the Federal participation on the project. Costs recovered in excess of the actual CE costs shall be deducted from the construction costs.

The City may also include provisions for consequential damages when appropriate. Incentive/disincentive amounts are to be shown separately from the liquidated damage amounts.

Federal Regulation

- a. 23 CFR 635.127 – Overruns in contract time (applicable to projects on the National Highway System)
 - i. Requires entities to develop liquidated damage rates. As a minimum, the rate should include the average daily cost of construction engineering.
 - ii. Allows other costs to be included in liquidated damage rates.
 - iii. Allows incentive/disincentive provisions to be included in the contract, but must be separate from liquidated damages.

State Regulation

- a. Transportation Code 223.012 – Requires that TXDOT develops a schedule of liquidated damages.

Required Practices

- a. For all projects with federal and/or state funds, the City must follow TXDOT/Grantor policy on liquidated damages and incentive/disincentive. The City must develop liquidated damage rates based on the City's anticipated construction engineering cost.
- b. For projects with no federal or state funds, the City may follow their own practices.

City Responsibilities

- a. The City must develop liquidated damage rates that recover the cost of construction engineering. TXDOT/Grantor will approve the rate.
- b. Submit liquidated damage schedule to TXDOT/Grantor for approval.
- c. Submit other desired provisions, such as incentive/disincentive to TXDOT/Grantor for approval.
- d. Include appropriate language in bid documents
- e. Assess damages in accordance with bid documents.

TXDOT/Grantor Responsibilities

- a. Design-bid-build
 - i. For projects with state or federal funds, review City's liquidated damage schedule, incentive/disincentive rates, and implementing specifications for conformance with TXDOT/Grantor policy.
 - ii. Assure approved rates and provisions are included in bid proposals.
 - iii. Assure liquidated damages are properly assessed at final inspection.
 - iv. There is no monitoring on projects without state or federal funds.
- b. Design-build and concessionaire
 - i. For projects with state or federal funds, ensure the City implements provisions of the request for proposals.
 - ii. There is no monitoring on projects without state or federal funds.

Lobbying Certification

General. Section 319 of Public Law 101-121 (31 USC 1352) prohibits Federal funds from being expended to influence, or attempt to influence, a Federal agency or Congress in connection with the award of any Federal contract or grant. This prohibition applies to all recipients, including lower tier subrecipients of a Federal contract or grant. Prior to receiving funds in excess of \$100,000 per contract/grant, the City must submit to the granting agency a certification that it has not and will not make any prohibited payments for lobbying. By signing a contract or subcontract, a prime contractor or subcontract is certifying that it will comply with lobbying restrictions.

The City certification is to be retained by TXDOT/Grantor. Likewise, lower tier certifications are to be retained by the next higher tier (i.e., prime contractors retain their subcontractors' certifications, etc.)

Any participant that has made, or agreed to make, payments for lobbying activities using non-Federal funds, is required to disclose such activities. Payments of non-Federal funds to regularly employed officers or employees of the agency or firm are exempt from the disclosure requirement.

Federal Regulation

- a. 23 CFR 635.112(g)
 - i. The administrating entity must include the lobbying certification in the bid documents (by virtue of putting Form FHWA-1273 into the contract).
 - ii. By signing a bid document that includes Form FHWA-1273, the bidder certifies that they meet lobbying requirements of 49 CFR 20.
 - iii. The prime contractor must include lobbying certification in all lower tier contracts in excess of \$100,000.
- b. 49 CFR 20 – New restrictions on lobbying
 - i. Requires recipients of federal funds in excess of \$100,000 to file a disclosure form with FHWA.
 - ii. Contains details of the certification.

State Regulation

- a. No comparable statutes.

Required Practices

- a. None

City Responsibilities

- a. Include FHWA-1273 in bid document.
- b. Require contractor to include language in lower tier contracts.

Local Hiring Preference

General. The City may not include any contract provisions that require a contractor to give any preference in hiring. Some states and local public agencies have implemented policies that encourage or mandate the use of local employment or local contracting. In such cases, Federal-aid contracts (including invitations for bids or request-for-proposal documents) must contain specific provisions that state that such preferences are not applicable to contracts funded by FHWA. Compliance with local preference provisions will not be a condition of responsiveness in the consideration of bids or a condition of responsibility prior to the award of contract.

While the state and local governments are precluded from enacting such preference requirements, this requirement does not apply to the Federal Government. Therefore, Federal hiring preference requirements, such as EEO/Affirmative Action, Appalachian Preference, and Indian Preference are not in conflict with this policy.

Federal Regulation

a. 23 CFR 635.117(b) – Prohibits including provisions in contract documents that requires or encourages that a contractor give preference in hiring on any project that includes federal funds. Compliance with local preference provisions will not be a condition of responsiveness in the consideration of bids or a condition of responsibility prior to the award of contract.

State Regulation

a. Transportation Code 223.043 – For projects on the state highway system, TXDOT/Grantor may require that a citizen of the United States and of the county in which the project is being proposed be given preference in employment to perform manual labor.

Required Practices

- a. No hiring preferences will be allowed on any projects that includes federal funds.
- b. For any projects with state funds, the City must gain TXDOT/Grantor approval before using contract or agreement language mandating hiring preference.
- c. For any projects with no state or federal funds, the CITY may follow their own practices on hiring preferences.

City Responsibilities

- a. For projects with federal funds, do not include any State or local hiring preferences in bid documents or request for proposals.
- b. For projects with state funds but no federal funds, request TXDOT/Grantor approval to require hiring preferences if desired. **(*** Check for consistency w/ State & local regulations. Delete if not ***)**

Materials

General. Plans and specifications need to clearly define the types, locations construction requirements in detail to facilitate the construction, the contract control and the estimation of construction costs of the project. The estimate must reflect the anticipated cost of the project in sufficient detail to provide an initial prediction of the financial obligations to be incurred by the City, State and federal government; and to permit an effective review and comparison of the bids received.

Federal Regulation

- a. 23 CFR 630.205 – The plans and specifications must describe construction requirements in sufficient detail to facilitate construction.
- b. 23 CFR 636B – Solicitations for design-build projects describe evaluation factors, which may include particular material quality requirements or design performance criteria (i.e., pavement design life).
- c. 23 CFR 637B describes a program (Quality Assurance Procedures) to determine specification compliance for materials incorporated into the project.

State Regulation

- a. Local Government Code 262.025 – A notice for receipt of competitive bids must include specifications describing the item to be purchased. This applies to counties – and projects funded with County funds.
- b. Local Government Code 271.025 – Governmental entity advertising for competitive bids must include information that describes the work.
- c. Local Government Code 271.188 – For design-build projects, the City must provide or contract for material engineering, testing and verification testing that is independent from the design-build firm.
- d. Texas Administrative Code, Title 43, §26.33(g)(1) – Specifications for projects that connect to a state highway administered by a Regional Mobility Authority must conform to TXDOT Standard Specifications.
- e. Texas Administrative Code, Title 43, §27.56(C)(3)(A) – Specifications for projects administered by a Regional Toll Authority must conform to TXDOT Standard Specifications as a condition of state fund participation.
- f. Transportation Code 221.003(d) – A County Commissioners Court may not make improvements to the state highway system until the plans and specifications have been approved by TXDOT.
- g. Transportation Code 366.185 – Contracts by Regional Tollway Authorities must be procured by a competitive bid procedure.
- h. Transportation Code 370.306 – A Regional Mobility Authority that uses a Comprehensive Development Agreement for procurement must publish criteria used to evaluate proposals. The criteria may include materials requirements.

Required Practices

- a. For projects with state or federal funds and projects on the state highway system, Grantor /TXDOT must approve the plans and specifications prior to advertising for competitive bids or a request for proposals. The City must either adopt TXDOT/Grantor's Standard Specifications or develop alternate specifications and submit to TXDOT/Grantor for approval. For alternate specifications, the material requirements must fulfill the purpose of the approved design and must be in general conformance with TXDOT/Grantor material quality standards. Proposed changes to material requirements must have TXDOT/Grantor approval before the City implements the change.
- b. For projects off the state highway system and no state or federal funds, the City may use their own material requirements without TXDOT/Grantor approval.
- c. If a concessionaire agreement includes long-term maintenance (40 years or more), the concessionaire may use any material that meets performance requirements of the project at their discretion without TXDOT/Grantor approval.

City Responsibilities

- a. Adopt TXDOT/Grantor Standard Specifications or submit alternate, comparable specifications to TXDOT/Grantor for approval.
- b. Request TXDOT/Grantor approval of changes to material specifications before implementation.
- c. For design-build, submit evaluation criteria to TXDOT/Grantor before issuing request for proposals

Method of Construction (or Method of Bidding)

General. Construction contracts are to be awarded by competitive bid. One of the most basic tenets of Federal-aid contracting is that construction contracts are to be awarded competitively to the contractor that submits the lowest responsive bid. This mandate is set forth in 23 U.S.C. 112 and reinforced by 23 CFR 635.114(a) which requires that: "Federal-aid contracts shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria of responsibility...." The act of a City negotiating with an apparent low bidder prior to award is defined as "bid rigging in reverse" and is expressly prohibited by 23 CFR 635.113(a). Adding alternates may be considered after bids are opened only if the contract contains the priority order in which alternates are to be considered. There may be situations that support the use of a contracting method other than competitive bidding. Noncompetitive construction contracting or other unusual methods of construction may be approved under one of two conditions:

- The option is proven to be more cost effective, or
- An emergency exists and time is a critical factor.

23 CFR 635 Subpart B allows that "rare" circumstances may justify the use of force account, negotiated contract or other unusual method of construction. The regulations clearly indicate that in the absence of an emergency situation circumstances are unlikely to justify the use of other methods of construction. Therefore, the consideration of any noncompetitive construction contract method requires a cost effectiveness determination as well as an evaluation that demonstrates that the circumstances are unusual and unlikely to recur.

In addition to meeting City requirements associated with emergency purchases; a cost effectiveness finding is required for the TXDOT/Grantor approval of any City proposal to use a non-competitive method of contracting. Title 23 CFR 635.205 cites the following situations as possible reasons for the use of noncompetitive construction contracting:

- When the rights or responsibilities of the community are so affected as to require a special course of action, including situations where there is a lack of competition or unreasonable bids, it may be determined to be cost effective to use force account.
- When by reason of the inherent nature of the operation, it is deemed cost-effective to do minor adjustments of railroad and utility facilities (major work still to be accomplished by competitive bidding) by force account.

Under the first circumstance the use of force account may be found cost-effective when properly documented. Under the second circumstance, FHWA has determined that the use of force account is always cost-effective, and therefore, no additional documentation is required.

Force account work using City forces is discussed in 23 CFR 635 Subpart B and is defined as: "...the direct performance of highway construction work by an City by use of labor, equipment, materials, and supplies furnished by them and used under their direct control".

Force account contracts with a private contractor are an exception to normal construction contracting procedures and should rarely be approved.

Circumstances that justify a negotiated construction contract should be even more of an exception, making approvals of such contract methods extremely rare.

Federal Regulation

- a. 23 CFR 635.104 – Construction work must be performed by competitive bids unless some other method is more cost effective or an emergency exists.
- b. 23 USC 112(b)(3) – Allows design-build as an acceptable contracting method for federally funded projects.
- c. 23 CFR 636 – Implementing language on design-build contracting.

State Regulation

- a. Local Government Code 252.021 – Municipalities must use competitive sealed bids for contracts in excess of \$50,000.
- b. Local Government Code 262.023 – Counties must use competitive bidding procedures for purchases over \$25,000.
- c. Local Government Code 271.006 – A municipality must comply with the requirements of Chapter 252 and a county must comply with the requirements of Subchapter C, Chapter 262.
- d. Local Government Code 271.192 – For design-build projects the City must select a design-build firm using a combination of technical qualifications and cost.
- e. Transportation Code 223.201 – TXDOT/Grantor may enter into agreements for a comprehensive development agreement with a private entity to design, develop, finance, construct, maintain, repair, operate, extend roadways.
- f. Transportation Code 366.185 – Contracts let by a Regional Tollway Authority must be let by a competitive bidding procedure.
- g. Transportation Code 370.185 – Contracts let by a Regional Mobility Authority may be let by a competitive bidding procedure.
- h. Transportation Code 370.305 – A Regional Mobility Authority may use a comprehensive development agreement with a private entity.

Required Practices

- a. For projects with state or federal funds, the City must obtain TXDOT/Grantor approval for any procurement method other than competitive bidding unless the alternate procurement method is allowed by state or federal statute. If competitive bidding is the method used, the City must submit their process to TXDOT/Grantor for approval. The process must meet the requirements of Transportation Code 223.
- b. For projects with no state or federal funds, the City may use their own procurement methods without prior TXDOT/Grantor approval.

City Responsibilities

- a. Submit competitive bidding process to TXDOT/Grantor for approval or written cost effective justification or emergency condition if procurement other than competitive bidding is desired.
- b. For design-build projects, include language in RFP outlining selection criteria based on technical qualifications and cost.
- c. For concession projects, follow terms of agreement with TXDOT/Grantor.

Note: The agreement between TXDOT / Grantor and the City will indicate whether the project will be procured through a design-bid-build, design-build, or other process. The Grantor will work with the City during project development to assure that procurement meets the terms of the agreement.

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Non-collusion Statement

General. The submission of a non-collusion statement protects the integrity federal-aid programs and the City by serving as a deterrent to bid rigging activities. The certification also becomes evidence in prosecuting cases involving construction contract bid rigging. A non-collusion statement is required from all bidders and is to be submitted as part of the bid proposal package. Failure to submit the required certification will result in the bid being considered as non-responsive and ineligible for award consideration.

The City must include provisions in the bidding proposals that require all bidders to include a non-collusion statement with their bid. The FHWA, in consultation with the U. S. Department of Justice (USDOJ), has concluded that the non-collusion statement may be either an unsworn declaration made under penalty of perjury under the laws of the United States, or a sworn affidavit executed and sworn before a person who is authorized to administer oaths by the laws of the State.

All non-collusion certifications shall be retained by the City in accordance with the retention policy of 49 CFR 18.42. These certifications could serve as important evidence in the event that collusion or bid rigging is discovered at a later date.

Federal Regulation

a. 23 CFR 635.112(f) – For all projects with federal funds, a non-collusion statement is required from each bidder and is to be submitted as part of the bid package. If not submitted, the bid is non-responsive.

State Regulation

a. No comparable state statute.

Required Practices

a. The City must comply with federal statutes.

City Responsibilities

- a. The City must insure that all bidders submit a non-collusion statement. If a bidder fails to submit the statement, their bid may not be opened, read and considered for contract award.
- b. Include non-collusion statement in bid package or in the request for proposal for design-build projects.
- c. Assure statement is submitted before reading bid.
- d. Retain statement for all bidders.

Non-discrimination against Persons with Disabilities

General. Discrimination on the basis of disability by public entities is prohibited. The prohibition extends to all activities of state and local governments participating in federally assisted programs. There are three federal laws that require accessible planning, design and construction, and actions to integrate people with disabilities into mainstream society. The Americans with Disabilities Act (ADA) prohibits discrimination against people with disabilities in all aspects of life, including transportation, public services, employment, housing, public accommodations, education, communication, worship, recreation and health services, regardless of funding source. Section 504 of the Rehabilitation Act of 1973 (as amended by the Civil Rights Restoration Act of 1987) addresses compliance with Federal design standards for accessibility. The Architectural Barriers Act of 1968 requires access to facilities designed, built, altered, or leased with federal funds.

In addition, the Texas Architectural Barriers Act of 1969, as amended, requires that each building and facility subject to the Act be accessible to and functional for persons with disabilities. Subject facilities include facilities used by the public that are constructed, renovated, or modified, regardless of funding source. The law requires compliance with the Texas Accessibility Standards and the rules promulgated by the Texas Department of Licensing and Regulation (TDLR) in Title 16, Texas Administrative Code, Chapter 68.

The City must ensure that accessibility for individuals with disabilities is provided in the construction of all new transportation facilities. When altering existing transportation facilities, the City must also ensure that the alterations are made in such a way as to provide access and utilization by individuals with disabilities.

49 CFR 37.3 defines a facility as: "...all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located".

Federal Laws and Regulations

- a. 29 USC 794, et seq.—Section 504 of the Rehabilitation Act of 1973 (as amended by the Civil Rights Restoration Act of 1987).
- b. 42 USC 3, et seq. 12111 – Americans with Disabilities Act (Title II).
- c. 28 CFR Part 35 – Nondiscrimination on the Basis of Disability in State and Local Government Services.
- d. 49 CFR Part 27 – Nondiscrimination on the Basis of Disability in Programs or Activities Receiving Federal Financial Assistance. .
- e. Public Law 100-259; 102 Stat. 28 – Civil Rights Restoration Act of 1987.
- f. 23 CFR Part 652 – Pedestrian & Bicycle Accommodations and Projects.
- g. 23 CFR Part 1235 – Uniform System for Parking for Persons with Disabilities.
- h. 23 CFR 450.220(a) (4) – ADA Requirements to be Certified into Statewide Planning.
- i. 23 CFR 450.316(b)(3) – ADA Requirement for Metropolitan Planning.
- j. 23 CFR 771.105(f) – ADA Requirements for NEPA.
- k. Public Law 109-59 – Safe, Accountable, Flexible, Efficient Transportation Equity

Act: A Legacy for Users (SAFETEA-LU) of 2005.

State Regulations

- a. Texas Occupations Code, Chapter 51 – Establishes the Texas Department of Licensing and Regulation (TDLR).
- b. Texas Government Code 469 – Ensures that public buildings and facilities are accessible to and functional for persons with disabilities.
 - i. Section 469.105 – Requires inspection of buildings and facilities covered by the statute by TDLR or Registered Accessibility Specialist.

Preferred Practices

- a. All projects must comply with the provisions of the cited statutes.
- b. The City is responsible for coordination of TDLR inspection and for paying all fees assessed by TDLR.

City Responsibilities

- a. Ensure all new and existing transportation facilities are designed and constructed to comply with the provisions of all cited statutes
- b. Request final inspection from TDLR
- c. Implement ADA Program to include: ***(** Confirm COA Program is acceptable to granting agency and implement additional measures as needed **)***
 - i. Notice of Nondiscrimination requirements – The City will inform the public that they do not discriminate on the basis of disability in their programs, services and activities.
 - ii. Methods of Notification of Nondiscrimination Requirements – The City will post their notice in local papers, magazines, bulletins, announcements, handbooks, pamphlets, brochures recruitment materials, application forms and any other publication they distribute.
 - iii. Self-Evaluation – The City will conduct a self-evaluation to ensure their policies and practices comply with ADA.
 - iv. Transition Plan – Since the City of Austin employs 50 or more persons, the City will develop a transition plan for making structural changes to existing facilities so that they are accessible to individuals with disabilities. The transition plan must meet the requirements of 28 CFR 35.150(d).
 - v. Designation of an ADA/504 Coordinator – The City will designate at least one employee to coordinate ADA/504 programs. Contact information will be made available to the general public.
 - vi. Provision of Reasonable Accommodations for Employment – The City will comply with the provisions of Title I and II of the ADA.
 - vii. Adopting Grievance/Complaint Procedures for Disability Discrimination Complaints – The City will adopt a grievance procedure to address all complaints dealing with ADA/504 provisions.
 - viii. Provision of Accessible Programs, Services and Activities – The City will ensure that no individual with a disability is excluded from any service, program or activity.
 - ix. Provision of Accessible Communications – The City will provide auxiliary aids and services to ensure that all communications with individuals with disabilities is effective.

- x. Monitoring/Enforcement – The City will maintain all program records and make them available for review by federal officials.
- xi. Maintenance of Accessible Features – The City will ensure that facilities are properly maintained and readily accessible to individuals with disabilities.
- xi. Other Program Requirements – The City will comply with the “Pedestrian and Bicycle Accommodations and Projects” and the “Uniform System for Parking for Persons with Disabilities.”

TXDOT/Grantor Responsibilities

- a. For projects with state or federal funds and all projects on the state highway system, the City will submit a certification sealed by an engineer licensed in Texas that construction standards have been met. TXDOT/Grantor will conduct a final inspection before issuing final payment to the City. TXDOT/Grantor should make the City aware of any accessibility concerns noted during periodic inspections during construction.
- b. The District must verify that TDLR has conducted their final inspection and has approved the project. If the TDLR inspection noted any deficiencies, obtain the City’s certification that the deficiencies were corrected before recommending TXDOT/Grantor final acceptance of the project. If state or federal funds are used, final payment to the City will not be made until TDLR has inspected the project and all issues noted have been corrected.
- c. There is no monitoring on projects without state or federal funds off the state system.

Non-Resident Bidder and Texas Preference

General. State laws that provide a bidding preference for resident bidders are not applicable to federal-aid contracts.

For state funded projects, the Legislature enacted statute regarding non-resident bidders. Government Code §2252.002 states: "A governmental entity may not award a governmental contract to a non-resident bidder unless the non-resident underbids the lowest bid submitted by a responsible resident bidder by an amount that is not less than the amount by which a resident bidder would be required to underbid the non-resident bidder to obtain a comparable contract in the state in which the non-resident's principal place of business is located."

This law may be referred to as the "Reciprocity Requirement." Information about States that have bidding preference laws may be obtained from the Texas Secretary of State's Office.

Federal Regulation

- a. 23 CFR 635.110(b) – There may not be any procedures which prohibit consideration of a bid by any responsible contractor, whether a resident or nonresident of a state in which the work will be performed.
- b. 23 CFR 635.110(f)(1) – For design-build projects, there may not be any procedures that give geographical preference in the selection process.

State Regulation

- a. Government Code 2252.002 – Prohibits governmental entities from awarding a contract to a non-resident bidder unless the non-resident bidder underbids the lowest resident bidder by a reciprocal percentage.

Required Practices

- a. For projects with federal funds, non-resident preference provisions will not be allowed.
- b. For projects with no federal funds, the City must follow the state statute.

City Responsibilities

- a. For projects with federal funds, ensure there are no resident preference provisions included in bid proposals, requests for proposals, and concessionaire agreements. The Texas bidding preference statute is not applicable to federal-aid projects.
- b. For projects with state funds, ensure provisions to implement Texas statute are included in bid proposals, requests for proposals, and concessionaire agreements. The City will need to contact the Texas Secretary of State's Office to obtain a list of States with a preference requirement. In summary, for projects with state funds:
 - i. Include language to implement Texas statute in bid document, request for proposals, or concessionaire agreement.
 - ii. Obtain list of states with reciprocity statutes from Texas Building and Procurement Commission web site.
 - iii. Apply reciprocity in contract award if applicable.
 - iv. Inform TXDOT/Grantor in the request for award concurrence if a bidding preference was applied in the determination of contract award.

Non-Responsive Bid

General. A list of reasons for a bid to be considered non-responsive must be included in the bid document in conjunction with 23 CFR 635.112(h). The reasons must be clearly defined.

Careful thought should be given in determining the reasons for not accepting a bid. The FHWA has determined that the reasons for a bid being non-responsive listed in the proposal cannot be "waived". Therefore, common provisions allowing a City to waive technicalities determined to be in its best interest cannot be invoked regarding a non-responsive bid.

The inclusion of reasons that a bid "may" be declared non-responsive must not be included. The FHWA has stressed that the use of potential subjective reasons must be eliminated; the bid is either responsive or non-responsive.

Federal Regulation

a. 23 CFR 635.112(h) – Bid documents must contain requirements with which a bidder must comply to make the bid responsive. Failure to comply with these requirements makes the bid non-responsive and not eligible for award.

State Regulation

- a. Local Government Code 271.0245 – A county must provide all bidders with the opportunity to bid on the same items on equal terms and have bids judged according to the same standards as set forth in the specifications.
- b. Texas Administrative Code, Title 43, §26.33(g)(1) – Specifications for projects that connect to a state highway administered by a Regional Mobility Authority must conform to TXDOT Standard Specifications.
- c. Texas Administrative Code, Title 43, §27.56(C)(3)(A) – Specifications for projects administered by a Regional Toll Authority must conform to TXDOT Standard Specifications as a condition of state fund participation.
- d. Transportation Code 370.306(c) – For projects acquired by Comprehensive Development Agreement, a Regional Mobility Authority must include criteria used to evaluate proposals in the request for proposals.

Required Practices

- a. For projects with state or federal funds, the City must adopt Article 2.7 of TXDOT's Standard Specifications or submit alternate definitions of a "non-responsive bid" for TXDOT/Grantor approval.
- b. For projects with no state or federal funds, the City should follow their statutes and practices. TXDOT/Grantor approval is not required.

City Responsibilities

- a. On design-bid-build, adopt Article 2.7 of TXDOT Standard Specification or submit alternate for TXDOT/Grantor approval.
- b. On design-build, gain TXDOT/Grantor approval of reasons that make a proposal nonresponsive and list in request for proposals

- c. List reasons that make a bid non-responsive in bid documents or in the request for proposal in design-build projects.
- d. Check submitted bids or proposal for compliance with reasons.
- e. Do not consider non-responsive bids for award.
- f. List reasons that make a proposal non-responsive in request for proposals.
- g. Do not consider non-responsive proposals.
- h. For concession projects, require concessionaire to include appropriate language in any competitive bidding the concessionaire may pursue.

DRAFT

Non-Segregated Facilities

General. The contractor cannot discriminate against any person by having segregated facilities. By entering into the contract, the contractor certifies that they maintain non-segregated facilities that conform to the requirements of 41 CFR 60.1.8. This certification is included in Form FHWA 1273. The prime contractor is required to obtain a similar certification from each subcontractor and supplier, as applicable.

One exception to the non-segregated facilities provision is for the disabled when the demands for accessibility override the need to non-segregate (e.g., disabled parking). In addition, single-user or separate bathrooms or dressing facilities are also allowable for privacy purposes.

Federal Regulation

- a. 23 CFR 633A –Contractors and subcontractors must certify that they do not discriminate by providing segregated facilities or prohibiting minorities access to facilities. Does not prohibit providing access to the disabled and single-user or separate bathrooms or dressing facilities for privacy.
- b. 41 CFR 60.1.8 – Provides the basis for the non-segregated facilities certification.

State Regulation

- a. No comparable statutes.

Required Practices

- a. The City must comply with the federal statute on all projects with federal funds.

City Responsibilities

- a. Include Form FHWA 1273 in bid documents.
- b. Advise potential bidders that submission of a bid constitutes the certification.
- c. Assure the contractor gets a certification from all subcontractors and materials suppliers more than \$10,000

Patented / Proprietary Products

General. Federal funds may not participate in a premium or royalty on any patented or proprietary product. However, there are provisions that allow specifying brand names under certain conditions. The following are conditions under which FHWA may participate in payment for patented or proprietary materials, specifications or processes specifically set forth in the plans and specifications:

- ◆ The item is purchased or obtained through competitive bidding with equally suitable unpatented items,
- ◆ The City certifies either that the proprietary or patented item is essential for synchronization with existing facilities or that no equally suitable alternative exists, or
- ◆ The item is used for research or for a special type of construction on relatively small sections of work for experimental purposes.

The primary purpose of the policy is to have competition in selection of materials and allow for development of new materials and products. The policy further allows that materials and products that are judged to be equal may be bid under generic specifications. If only patented or proprietary products are acceptable, they must be bid as alternatives with all, or at least a reasonable number, of acceptable materials or products listed.

Trade names are generally the key to identifying patented or proprietary materials. Products identified by their brand or trade name may not be specified without an "or equal" phrase. Further, all, or at least a reasonable number, of acceptable "equal" materials or products must be listed. The licensing of several suppliers to produce a product does not change the fact that it is a single product and should not be specified to the exclusion of other equally suitable products.

Below are examples of conditions under which patented or proprietary materials may be used on Federal-aid projects.

Case I. The item is identified by the contract specifications along with a listing of other acceptable products and the list includes a reasonable number of acceptable products. Federal funds may then participate in the cost of a patented or proprietary item since it is acquired competitively.

Case II. The City certifies, and TXDOT/Grantor agrees, that the product is essential for synchronization. This is particularly appropriate when upgrading or expanding existing traffic signal systems. The existing controller(s) is part of an existing system that is not compatible with any other system hardware. To convert the overall system would be more expensive than to add to what is already there. Thus, it is in the public interest to require the compatible proprietary item. Upon TXDOT/Grantor's concurrence, the item may be specified.

Case III. The City certifies that there is no equally suitable alternate. TXDOT/Grantor must reasonably verify this situation. Based on a public interest finding, with TXDOT/Grantor's concurrence, the item may be specified.

Case IV. Products appear from time to time that are new and innovative (i.e. research item or experimental feature). Based on the developer's claim, manufacturer's claim, or because of certain local conditions, there may be sufficient justification to evaluate the product in actual usage. The City may then elect to submit a detailed plan of research and evaluation (work plan) for the product. The work plan may also be used to develop specifications in order to provide a basis for future competition with other materials. TXDOT/Grantor must approve the work plan prior to specifying proprietary products. If approved, the specifications may then require the proprietary item.

Federal Regulation

- a. 23 CFR 635.411 – With a few exceptions, federal funds cannot participate in premiums or royalties for patented or proprietary products. Brand names cannot be used in plans and specifications unless either a public interest determination is approved or a reasonable number of equal product names are listed.
- b. 23 CFR 635.411(e) – For design-build projects, brand names cannot be specifically set forth on the Request for Proposals

State Regulation

- a. Government Code 2155.067 – A written justification must be provided to the Texas Building and Procurement Commission for products that are proprietary to one vendor.

Required Practices

- a. The City must comply with the federal statute for projects with federal funds.
- b. For projects with state funds, the City must submit a written justification for TXDOT/Grantor approval before specifying proprietary products.
- c. For projects with no state or federal funds, the City may use their own practices.

City Responsibilities

- a. The City must not specify patented or proprietary products in their contracts without prior written approval from TXDOT/Grantor.
- b. For design-build projects, the City prepares the RFP, and the RFP cannot have patented or proprietary items unless supported by an approved public interest finding as per 23 CFR 635.411(a). **However, once the design-build firm is selected, the successful design-builder can require patented or proprietary products and not be in violation of the regulations. (***) Confirm(***)**

Prequalification

General. The City may include provisions for prequalification in invitations for receipt of bids. The American Association of State Highway and Transportation Officials (AASHTO) defines prequalification as a means of predetermining job experience and work capacity and to identify individuals and organizations from whom the agency may accept a bid. The AASHTO has also encouraged the use of prequalification procedures in its 1981 Suggested Guidelines for Strengthening Bidding and Contract Procedures.

Generally, prequalification consists of an evaluation of the contractor's experience, personnel, equipment, financial resources and performance record. The information required for prequalification may be extensive, however, the prequalification process should be relatively short so that it may be completed during the project advertising period. The City's prequalification process should not be used to limit competition or discourage the submission of a bid by an otherwise responsible contractor. AASHTO recommends the following information be required for prequalification:

- ◆ Detailed financial statement,
- ◆ Resident agent,
- ◆ Capacity and control classification,
- ◆ Experience and performance,
- ◆ Ownership or control,
- ◆ Equipment, and
- ◆ Updated information when there is corporate or affiliate change or reduction of 10 percent or more of the firm's assets.

The FHWA does not require that a city implements procedures or requirements for prequalification on federal-aid projects. However, if the City has these procedures or requirements, they must conform to the FHWA competitive bidding policy and not restrict competition.

The procedures and requirements the City proposes to use for qualifying and licensing contractors and determining who may bid, be awarded, or perform Federal-aid contracts shall be submitted to TXDOT/Grantor for advance approval. Only those procedures and requirements so approved shall be effective with respect to federal-aid projects. Any changes in approved procedures and requirements shall likewise be subject to approval by TXDOT/Grantor.

No procedure or requirement for prequalification, qualification or licensing of contractors shall be approved which, in the judgment of TXDOT/Grantor, may operate to restrict competition, prevent submission of a bid, or prohibit consideration of a bid submitted by any responsible contractor, whether resident or nonresident of the State or local area.

No contractor shall be required by law, regulation, or practice to obtain a license before a submission of a bid or before the bid may be considered for award of a contract. Contractor prequalification may be required as a condition for submission of a bid or award of contract only if the period between the date of issuing a call for bids and the date of opening of bids

affords sufficient time to enable a bidder to obtain the required prequalification rating. However, the City may require licensing of contractors after the bids are opened if the requirement is consistent with competitive bidding principles. In other words, the requirement must be applied uniformly to all contractors.

The FHWA regulations on licensing do not specifically address subcontractor-licensing issues.

Although the City may have a compelling reason (e.g., State or local law) to utilize a procedure that differs from acceptable Federal-aid practice, the procedure may not be applied to a federal-aid project. 23 CFR 635.112(d) specifically requires that the City must inform bidders of contract provisions which do not apply to federal-aid projects. This information must be included in the advertisement, specifications, special provisions or other governing documents as appropriate.

An example of an inappropriate provision would be a State or local preference clause in the standard specifications. Since the clause provides some competitive advantage for in-state or local contractors, the clause violates the Federal open competition requirements and therefore, could not be applied to a Federal-aid project. Other examples would be a restriction on products or services from specific foreign countries; a requirement to provide insurance for domestic partners; or small business set-asides.

Federal Regulations

- a. 23 CFR 635.110 Contains the following provisions.
 - i. For design-bid-build projects
 - 1. It is not allowed to restrict competition or provide in-state preference.
 - 2. It is not allowed to require that a contractor be licensed before submitting a bid or before consideration of a bid. However, an entity may require the bidder to have various technical licenses (master electrician, etc.) if the requirement is consistent with competitive bidding practices; i.e. it is applied uniformly to all contractors.
 - ii. For design-build projects
 - 1. Geographic location may not be part of the selection criteria.
 - 2. It is allowed to require successful offeror to establish a local office after award.

State Regulations

- a. Texas Administrative Code 43, Part 1, Rule 9.12 – Requires potential bidders to be prequalified by TXDOT as a condition of submitting a bid. Includes waiver provisions for small projects, maintenance projects, and specialty projects.
- b. Local Government Code 271.189 – For design-build projects a city must solicit qualifications outlined in this Section.

Required Practices

- a. For projects with state or federal funds, the City must require that potential bidders be prequalified by TXDOT/Grantor. This policy also applies to projects on the state system

with no state or federal funds. If the City wants to use qualification criteria in addition to those prescribed by TXDOT/Grantor, the criteria must be approved by TXDOT/Grantor before becoming part of the bid documents.

- i. Design-bid-build – The bidder must send a letter to the City allowing TXDOT/Grantor to release “available bidding capacity” to the City. The City will forward the letter to TXDOT/Grantor. TXDOT/Grantor will respond and the bidder may then submit a bid.
 - ii. Design-build and concessionaire – This provision does not apply.
- b. For projects off the state system and with no state or federal funds, the City is encouraged to use TXDOT/Grantor-prequalified contractors but may use their own qualification process.

City Responsibilities

- a. For projects with federal or state funds, require that bidders be prequalified by TXDOT/Grantor.
 - i. Submit any additional, desired qualifying / licensing procedures to TXDOT/Grantor for approval.
 - ii. Do not include a requirement for a contractor to obtain a license as a condition of submitting a bid.
 - iii. May require the successful bidder to obtain a license if applied across the board.

Prevailing Minimum Wage

General. The payment of predetermined minimum wages for certain job classifications used on federal-aid contracts is derived from the Davis-Bacon Act of 1931 (40 U.S.C. Section 276a et seq.) (40 USC 3141) and is prescribed by 23 U.S.C. 113. The Davis-Bacon Act requires the payment of locally prevailing wages and fringe benefits to laborers and mechanics employed on Federal contracts in excess of \$2,000 for construction, alteration, or repair (including painting and decorating) of public buildings or public works. Davis-Bacon was enacted as a means to prevent contractors from importing cheap labor from outside the area, thereby, keeping capital at home with the local labor force where it would do the most good. Davis-Bacon provisions are covered in Form FHWA-1273 as discussed in the following sections:

- ◆ Section IV.1. This section sets forth the general requirements for the contractor, and subcontractors, to pay employees working at the site at least the minimum wage rate and fringe benefits specified for the classification of work performed. The City is responsible for incorporating the applicable wage rate decision into each Federal-aid contract. The US Department of Labor (DOL) requires that an amendment for a general wage rate determination be incorporated into a Federal-aid contract if notification of the change is published in the Federal Register 10 days or more prior to the opening of bids.
- ◆ Section IV.2. All employees covered by Section IV are to be classified in conformance with the wage rate determination. If an additional classification is deemed appropriate, either DOL approval or a DOL determination for the classification is required. In this case, the City via CMD's Wage Compliance Team should submit Standard Form SF-308 - "Request For Wage Determination and Response to Request."
- ◆ Section IV.3. This section sets forth requirements for paying fringe benefits.
- ◆ Section IV.4. The provisions of this section set forth the requirements for paying less than the full specified wage rate for employees who are registered in USDOL approved apprenticeship and trainee programs or for those who are classified as helpers.
- ◆ Section IV.5. This section clarifies that the US Department of Transportation apprenticeship and trainee programs are not subject to the DOL program provisions stated in Section IV.4.
- ◆ Section IV.6. The City has authority to withhold funds from the contractor, as may be determined necessary, to pay employees of the contractor the full amount of wages required by the contract. Withholdings are maintained by the City until restitution is evidenced. These withholding provisions also apply to wage underpayment by a subcontractor; however, the actual withholding is taken from progress payments to the prime contractor.
- ◆ Section IV.7. The contractor is required to pay overtime at the rate of one-and-one-half times the employee's basic pay rate for all hours worked in excess of 40 hours per week.
- ◆ Section IV.8. This section provides for the assessing and withholding of liquidated damages for days on which the contractor did not pay overtime in accordance with Section IV.7. This withholding is a liability assessment against

the contractor or subcontractor of \$10 per day for each employee that was underpaid. The liquidated damages are furnished to the DOL for its overall enforcement activities. Liquidated Damages should be forwarded through TXDOT/Grantor to FHWA for deposit into the United States Treasury.

- ◆ Section IV.9. The City has authority to withhold funds from the contractor, as may be determined necessary, to pay the liquidated damages and to pay employees of the contractor the overtime wages required by Section IV.8.
- ◆ Section V.2. Each contractor and subcontractor must furnish the City copies of payrolls **each week** during which work was performed. Payrolls must include the following information for each employee:
 - Name;
 - Social Security number;
 - Address;
 - Work classification;
 - Hourly rate of pay;
 - Daily and weekly number of hours worked;
 - Deductions made; and
 - Actual wages paid

Payrolls submitted must conform to the requirements of USDOL form WH-347, including the required "Statement of Compliance" outlined in Form FHWA-1273 Section V.2.d. Contractors and subcontractors must maintain the payrolls and related documents associated with the contract a minimum of three years from the date of project completion. All project payroll records must be available to City, TXDOT/Grantor, FHWA or USDOL representatives for inspections, copying or transcription.

The submission of subcontractor payrolls is the responsibility of the prime contractor. If the prime contractor or subcontractor fails to submit the required weekly payrolls or make such records available for review, the City, TXDOT/Grantor, FHWA or USDOL may, after written notice to the contractor, suspend further payment under the contract. Furthermore, failure to submit the required payrolls or make such records available for review may be grounds for debarment in accordance with 29 CFR 5.12.

The USDOL has responsibility for enforcing these statutes and determining the prevailing wage rates. The USDOL establishes the prevailing wage rates by either a determination, based on an in-house review of payroll data, or by a survey based on wage data from active projects. Notices of wage rate decisions are published in the Federal Register. After many years of operating a subscription service for the publication of prevailing wage rates, the USDOL is now posting this information on the Internet. As of March 2, 2001, Davis-Bacon wage rates are available electronically at the USDOL web site (see Davis-Bacon).

Applicability of Davis-Bacon - Site of Work. The Davis-Bacon Act limits coverage to laborers and mechanics " ...employed directly upon the site of the work." Since 1972, the DOL and the courts have been addressing various aspects of the applicability of Davis-Bacon requirements to site-of-work facilities. The USDOL's implementing regulation, 29 CFR 5.2(1)(2), extends

coverage to off-site facilities that are dedicated exclusively and in proximity to the actual construction site

29 CFR 5.2 (l)(1) states: "The site of the work is the physical place or places where the building or work called for in the contract will remain; and any other site where a significant portion of the building or work is constructed, provided that such site is established specifically for the performance of the contract or project"

One example would be a casting or fabrication yard for a segmental concrete bridge which is specifically established for a project after the award of contract. The City should contact the USDOL Regional Offices regarding a determination of what percentage of the work would constitute a "significant portion" and the potential coverage of such sites. If a significant portion of the work is to be constructed offsite, the City should attempt to include the wage determinations covering potential offsite location in the bid proposal.

29 CFR 5.2 (l)(2) also indicates other work areas not located on the site of permanent construction (job headquarters, tool yards, batch plants, borrow pits, etc.), may be part of the site of the work ".... provided they are dedicated exclusively, or nearly so, to performance of the contract or project, and provided they are adjacent or virtually adjacent to the site of the work." Permanent, previously established facilities are not covered, even where the operations for a period of time may be dedicated exclusively, or nearly so, to the performance of the contract.

29 CFR 5.2 (j)((1)(iv) provides that transportation between locations which are included in the "site of the work" are covered. This includes transportation between the permanent location of construction and covered sites where a "significant portion" of the work will be accomplished or covered sites that are dedicated exclusively and adjacent or virtually adjacent to the site of the work.

The USDOL has made the determination that when transportation will take place in more than one wage determination area, the applicable wage determination will be the wage determination for the area in which the construction will remain when completed. This determination will apply to all bidders, regardless of where they propose to construct significant portions of the project.

Applicability of Davis-Bacon to Specific Work Types:

Exploratory drilling services - Subsurface utility engineering or utility location services are considered to be exploratory drilling services. These contracts provide the location of utilities for engineering or planning purposes. Davis-Bacon does not cover them. See USDOL FOH 15d03(b).

Flaggers - The DOL has determined that the duties of flaggers are manual or physical in nature and therefore are covered by the Davis-Bacon Act. See USDOL FOH 15e09(a). Employees of

traffic service companies that rent equipment and perform only incidental functions at the work site in conjunction with the delivery of equipment are not covered. See USDOL FOH 15e09(b).

Force Account Work by Public Agencies - In some circumstances, the City may be authorized to perform the construction work using their own forces. Davis-Bacon provisions do not apply to governmental agencies and states. Public agencies are not considered "contractors" or "subcontractors" within the meaning of the Davis-Bacon Act. See USDOL FOH 15b05(a). However under Government Code §2258.021, workers employed by the City, or other public entity, are covered and must be paid the appropriate prevailing wage rates stipulated by Government Code Chapter 2258.

Helpers - Helpers are permitted on covered contracts if the helper classifications are specified in the applicable wage rate determinations. See USDOL FOH 15e04.

Inspectors - The contractor's employees who make inspections for quality and contract compliance (including quality control or quality assurance) are not usually considered to be laborers or mechanics and therefore, are not covered. See USDOL FOH 15e13.

Materialmen and Suppliers - The manufacturing and delivery of supply items such as sand, gravel and ready-mixed concrete at the work site, when performed by companies serving the general public, are generally not activities covered by Davis-Bacon. See USDOL FOH 15e15.

Owner-operators of Trucks and Other Hauling Equipment - As a matter of policy, the DOL exempts truck owner-operators from Davis-Bacon coverage. The contractor's certified payrolls should show the names of the truck owner-operator with the notation "Owner operator" but need not list hours worked or rates paid. This policy does not pertain to owner operators of other equipment such as bulldozers, scrapers, backhoes, etc. See USDOL FOH 15e16.

Project Engineers - The contractor's project engineers are generally not considered to be laborers or mechanics and therefore are not covered. See USDOL FOH 15e06.

Railroad and Utility Adjustments - Davis-Bacon provisions are not applicable to: 1) the relocation work done by a public utility or railroad forces, or 2) the relocation done by a contractor engaged by the utility or railroad. This has been a long-standing FHWA policy and has a basis in a May 15, 1985 legal opinion from FHWA's Chief Counsel. However, Davis-Bacon provisions apply when utility relocation work is part of a highway construction project to be performed by the highway construction contractor and/or subcontractor.

Summer Youth - The USDOL has strict requirements for the employment and payment of summer youth. See USDOL FOH 15e03.

Survey Crews - The actual duties of the survey crewmembers must be considered. Generally speaking, instrument persons, party chiefs and rod persons are not considered laborers or mechanics and therefore are not covered. However, a crewmember that primarily does

manual work (clearing brush) is covered for the time so spent. See USDOL FOH 15e19.

Transportation Enhancement (TE) Projects - Davis-Bacon only applies to projects located on highways functionally classified as Federal-aid highways (not local roads, rural minor collectors or projects not located on a highway system). Therefore, Davis-Bacon does not apply to TE projects that are not on Federal-aid highways unless they are tied to a Federal-aid highway project. However, under Government Code §2258.021, workers employed by the City, or other public entity, are covered and must be paid the appropriate prevailing wage rates stipulated by Government Code Chapter 2258.

Truck Drivers (not truck owner operators) - After 10 years in the courts, in May 1991, the Court of Appeals for the District of Columbia reached a final decision in the case of the Building and Construction Trades Department vs. Midway. The regulation in question, 29 CFR 5.2(j), included the "transporting of materials and supplies to or from the building or work by the employees of the construction contractor or construction subcontractor" in the definition of work covered by the Davis-Bacon Act. The Court ruled that this regulation is inconsistent with the Act and that it conflicts with the statutory objective of the Act. In the Court's view, the Act covers only mechanics and laborers who work on the site of the Federally-funded projects and does not cover those employed off-site, such as suppliers and material delivery truck drivers. In its review of the legislative history of the Act, the Court concluded that Congress clearly intended the Act to apply only to on-site workers. Thus, the Court ruled that truck drivers who come onto the site of the work to drop off construction materials are not covered by the Act, even if the contractor employs them.

Warranty Work - Davis-Bacon coverage applies to warranty or repair work if it is provided for in the original construction contract. This is true regardless of whether there is a pay item for the work. If an employee spends more than 20% of his/her time in a workweek engaged in such activities on the site of the original work, he/she is covered for all time spent on the site. The contract minimum wage rates apply regardless of whether the work is done five, ten or even 20 years after the contract execution.

Federal Regulation

- a. 23 USC 113 – Requires that laborers and mechanics be paid wages at rates not less than those prevailing on the same type of work on similar construction in the immediate locality as determined by the Secretary of Labor. This provision applies to all projects with federal funds that are on roadways functionally classified above a Rural Minor Collector.
- b. 40 USC 3141 – Davis-Bacon Act of 1931
- c. 40 USC 276(c) – Copeland Act, workers are protected from paying "kickbacks" to employers for the "privilege" of being employed.
- d. 23 CFR 633.102 – Form FHWA-1273 must be included in all construction contracts that have federal funds.
- e. 23 CFR 635.309(f) Minimum wage rates determined by the Department of Labor in accordance with the provisions of 23 U.S.C. 113, are in effect and will not expire before the end of the period within which it can reasonably be expected that the contract will be awarded.

- f. 23 CFR 636.119 – Projects developed under a public-private partnership must comply with all non-procurement provisions of 23 USC.
- g. 29 CFR 1,2,5 Procedures for Predetermination of Wage Rates, Copeland Act and enforcement provisions.

State Regulation

- a. Government Code 2258.021 – Requires that a worker employed on a public work by or on behalf of the state or a political subdivision of the state shall be paid:
 - i. not less than the general prevailing rate of per diem wages for work of a similar character in the locality in which the work is performed; and
 - ii. not less than the general prevailing rate of per diem wages for legal holiday and overtime work.
- b. Government Code 2258.022(a) – The public body must determine the general prevailing rate of per diem wages in the locality in which the public work is to be performed for each craft or type of worker needed to execute the contract and the prevailing rate for legal holiday and overtime work.
- c. Government Code 2258.023 – Provides for penalties assessed a contractor or subcontractor who violates the statute.
- d. Government Code 2258.024 – Specifies records to be maintained by the contractor and subcontractor.
- e. Government Code 2258, Subchapter C – Describes enforcement actions for violations of the statute.

Required Practices

- a. For federally funded projects functionally classified above Rural Minor Collector, the City must use US Department of Labor wage rates.
- b. For federally funded projects functionally classified Rural Minor Collector or Local Road, and for all projects with state funds, the City must use US Department of Labor wage rates or submit wage rates for TXDOT/Grantor approval that were developed in accordance with state statutes.
- c. For projects with no state or federal funds, the City must comply with state statutes, but may follow their own procedures. TXDOT/Grantor approval of wage rate determinations is not required.

City Responsibilities

- a. Include FHWA-1273 provisions, including Davis-Bacon wage rates in contract, request for proposals, or concessionaire agreement
- b. Assure provisions are included in all contracts and subcontracts exceeding \$2,000.00
- c. Assure wage rates are posted at the site of work
- d. Request additional classifications as necessary
- e. Assure workers are paid appropriate wage for work classification
- f. Assure contractor pays overtime for work in excess of 40 hours in a work week
- g. Work with USDOL to resolve any violations

Prison Produced Materials

General. There are limitations on using materials produced by convict labor in a Federal-aid projects. Materials produced after July 1, 1991 by convict labor may only be incorporated in a Federal-aid construction project if:

- ◆ Such materials have been produced by convicts who are on parole, supervised release, or probation from a prison; or
- ◆ Such material has been produced in a qualified prison facility (e.g. prison industry, with the amount produced during any 12-month period) for use in Federal-aid projects, not exceeding the amount produced, for such use, during the 12-month period ending July 1, 1987. Texas does not have a qualified prison facility meeting the requirements of the regulation.

Federal Regulation

a. 23 CFR 635.417 – Materials produced in a prison facility or by prison labor may not be used on federally funded projects for roadways functionally classified above a Rural Minor Collector.

State Regulation

a. No comparable state statute.

Required Practices

a. The City must follow the federal statute.

City Responsibilities

a. Develop contract language that prohibits use of prison-produced materials and include the contract language in bid documents.

Publicly-Owned Equipment

General. Equipment owned by the City may not compete with privately owned equipment. Publicly owned equipment is: "... equipment previously purchased or otherwise acquired by the public agency involved for use in its own operations".

Publicly owned equipment should not normally compete with privately owned equipment on a contracted project. However, in exceptional cases, a showing that it would clearly be cost effective to use publicly owned equipment may be justified. When supported by a public interest finding, TXDOT/Grantor may approve the City's proposal to use publicly owned equipment.

Federal funds may participate in the costs associated with the use of publicly owned equipment provided that:

- ◆ The plans, specifications and estimates (PS&E) submittal clearly sets forth the proposed use;
- ◆ The specifications indicate the items of equipment that are available, the rates to be charged, and the point(s) of availability or delivery; and
- ◆ The specifications include the express condition that the contractor has the option to rent all or part of the available equipment, or to provide the equipment.

The City cannot benefit from the rental of its own equipment by virtue of a Federal-aid contract. Accordingly, the rental rates must reasonably represent the cost of providing the equipment or there shall be a lump sum credit to Federal reimbursement on the project equal to the amount of profit on rental that the agency receives.

Federal Regulation

a. 23 CFR 635.106 – Prohibits publicly-owned equipment from competing with privately-owned equipment on a project to be let to contract. There are limited exceptions when justified in writing as being in the public interest.

State Regulation

a. No comparable statute.

Required Practices

a. On projects with Federal funds, the City may not require that a contractor use equipment owned by the local government. Limited exceptions may be granted by TXDOT/Grantor in unusual circumstances.

b. On projects with no federal funds, the City is not bound by the federal statute.

City Responsibilities

a. Do not include contract provisions requiring use of City equipment unless approved in writing by TXDOT/Grantor.

Railroad Insurance Provision

General. Contractors are required to purchase railroad protective liability insurance when work under the contract is located in whole or in part within railroad right-of-way. The insurance is for the benefit of the railroad. The requirement to provide the insurance is located at 23 CFR 646.107. The standards for railroad protective insurance established at 23 CFR 646.109 and 646.111 must be adhered to the extent permitted by the insurance laws of the State.

Listed below are the types of coverage required by 23 CFR 646.109:

(a) Coverage shall be limited to damage suffered by the railroad on account of occurrences arising out of the work of the contractor on or about the railroad right-of-way, independent of the railroad's general supervision or control, except as noted in Sec. 646.109(b) (4).

(b) Coverage shall include:

1. Death of or bodily injury to passengers of the railroad and employees of the railroad not covered by State workmen's compensation laws;
2. Personal property owned by or in the care, custody or control of the railroads;
3. The contractor, or any of his agents or employees who suffer bodily injury or death as the result of acts of the railroad or its agents, regardless of the negligence of the railroad;
4. Negligence of only the following classes of railroad employees:
 - (i) Any supervisory employee of the railroad at the job site;
 - (ii) Any employee of the railroad while operating, attached to, or engaged on, work trains or other railroad equipment at the job site which are assigned exclusively to the contractor; or
 - (iii) Any employee of the railroad not within (b)(4) (i) or (ii) who is specifically loaned or assigned to the work of the contractor for prevention of accidents or protection of property, the cost of whose services is borne specifically by the contractor or governmental authority.

The amounts of coverage required by 23 CFR 646.111 is as follows:

(a) The maximum dollar amounts of coverage to be reimbursed from Federal funds with respect to bodily injury, death and property damage is limited to a combined amount of \$2 million per occurrence with an aggregate of \$6 million applying separately to each annual period except as provided in paragraph (b) of this section.

(b) In cases involving real and demonstrable danger of appreciably higher risks, higher dollar amounts of coverage for which premiums will be reimbursable from Federal funds shall be allowed. These larger amounts will depend on circumstances and shall be written for the individual project in accordance with standard underwriting practices upon approval of TXDOT/Grantor.

Federal Regulation

a. 23 CFR 646 – Requires that a construction contractor carry public liability and property damage insurance when working on railroad right-of-way.

State Regulation

a. No comparable statutes.

Required Practices

a. On projects with federal funds, the City must follow the federal statute. In addition, the City must coordinate work on railroad right-of-way and include those provisions in the contract.

City Responsibilities

a. Coordinate with railroad.

b. Include provision for contractor's railroad liability insurance and other railroad provisions in bid documents, request for proposals, or concessionaire agreement.

c. Assure liability insurance is in force and is maintained.

Retainage

General. Chapter 223.010 of the Transportation Code allows five percent of the contract price to be retained until the entire improvement has been completed and accepted. However, Federal concerns over prompt pay (49 CFR 26.29) for subcontractors require that one the following three options be used if Federal funds are utilized. These options are:

- (1) You may decline to hold retainage from prime contractors and prohibit prime contractors from holding retainage from subcontractors.
- (2) You may decline to hold retainage from prime contractors and require a contract clause obligating prime contractors to make prompt and full payment of any retainage kept by prime contractor to the subcontractor within 30 days after the subcontractor's work is satisfactorily completed. The 30 days are changed to 10 days by Government Code Chapter 2251.022. The federal government allows states to be more restrictive. Therefore the 10 day requirement prevails.
- (3) You may hold retainage from prime contractors and provide for prompt and regular incremental acceptances of portions of the prime contract, pay retainage to prime contractors based on these acceptances, and require a contract clause obligating the prime contractor to pay all retainage owed to the subcontractor for satisfactory completion of the accepted work within 30 days (Changed to 10 days by Government Code Chapter 2251.022.) after your payment to the prime contractor.

If retainage is kept, the contractor may request that the amount retained be deposited under a trust agreement with a state or national bank selected by the contractor that has its main office or a branch office in this state. The City and the comptroller must approve the request. The City will provide a trust agreement, approved by TXDOT/Grantor that protects the interests of the City and the state.

The bank selected by the contractor will act as an escrow agent. The contractor may instruct the bank to reinvest the retained amount in a certificate of deposit, bank time deposit, or other similar investment prescribed by the trust agreement. A state or national bank that has its main office or a branch office in this state must issue the certificate of deposit.

Interest earned under the trust agreement is paid to the contractor unless specified otherwise under the trust agreement.

The bank is responsible under the trust agreement for all investments and amounts resulting from the deposits of the retained amount until released.

The contractor is responsible for paying all expenses incident to the deposit and all charges made by the bank for custody of the securities and forwarding of interest on those securities. Expenses or charges paid may not be applied to the contract or the state.

Federal Regulation

- a. While there is no federal statute that addresses retainage, FHWA policy allows recipients of federal funds to set retention rates from progress payments to protect the federal interest.
- b. 49 CFR 26.29 – As part of the DBE program, there must be a contract clause to require that prime contractors pay all subcontractors for satisfactory performance of their contracts no later than 30 days (Changed to 10 days by Government Code Chapter 2251.022.) from receipt of each payment you make to the prime contractor. Retainage may only be withheld if the contract provides for incremental acceptance of work with retainage paid to the prime contractor based on this partial acceptance. The prime must then pay all retainage to the subcontractor within 30 days (Changed to 10 days by Government Code Chapter 2251.022.) after the prime contractor receives payment for satisfactory completion of the accepted work.

State Regulation

- a. Government Code 2252.032 – Requires that a governmental entity deposit retainage in an interest-bearing account for contracts that exceed \$400,000 and have a retainage clause of more than 5%. The interest must be paid to the contractor.
- b. Transportation Code 223.009 – Allows partial payments to a contractor.
- c. Transportation Code 223.010 – Allows but does not require a 5% retainage until a project is complete and accepted. Provides for deposit of the retained amount be deposited under a trust agreement if requested by the contractor and approved by TXDOT and the Comptroller.

Required Practices

- a. For projects with federal or state funds, the City must adopt Article 9.6 of the TXDOT Standard Specifications with the applicable special provision approved by FHWA or submit an alternate option complying with 49 CFR 26.29 to TXDOT/Grantor for approval by FHWA.
- b. For projects with no state or federal funds, the City may follow agency practice.

City Responsibilities

- a. If retainage is not kept, adopt TXDOT spec Article 9.6 including FHWA-approved special provision and include in bid documents, request for proposals, or concessionaire agreement.
- b. If retainage is kept, make incremental final acceptance of subcontracted work.
- c. Follow retention schedule including release of retainage.

Safety: Accident Prevention (OSHA)

General. Provisions of the Occupational Safety and Health Administration (OSHA) apply. The administration of the national program for occupational safety and health rests with the Occupational Safety and Health Administration (OSHA) of the USDOL.

The FHWA and other agencies are required by law to ensure compliance with construction safety standards. Section VIII.3. of Form FHWA-1273 specifically grants USDOL representatives right of entry to projects that use Federal-aid funds. Specific subsections of the Form FHWA-1273 include:

- Section VIII.1. The provisions of this section require the contractor to comply with all applicable Federal, State and local laws governing safety, health and sanitation. The contractor is required to provide all safeguards, safety devices and protective equipment and is required to take such actions, as deemed necessary, to protect the life and health of employees and the safety of the public and property.
- Section VIII.2. The contractor or subcontractor may not require or permit a laborer or mechanic to perform work under conditions that are unsanitary, hazardous or dangerous to health or safety as determined by construction safety standards.
- Section VIII.3. This section sets forth the right of entry of USDOL representatives to any site of contract performance for the inspection or investigation of compliance with OSHA standards.

The City has enforcement responsibilities of any applicable State standards. In addition, the City should cooperate with and alert other responsible agencies regarding serious violations and provide full cooperation and assistance as required.

Federal Regulation

- a. 23 CFR 635.108 – Contracts must include provisions to insure full compliance with all applicable Federal, State, and local laws governing safety, health and sanitation and to require that the contractor provide all safeguards, safety devices, and protective equipment. This is implemented in Section VIII of Form FHWA-1273.
- b. 29 USC Chapter 15 – Describes establishment and implementation of standards employers are to follow for the safety of their employees.
- c. 29 CFR 1910 and 1926 – Contains health and safety standards for construction.

State Regulation

- a. Labor Code 411.103 – Requires employers to:
 - i. Provide and maintain employment and a place of employment that is reasonably safe and healthful for employees;
 - ii. Install, maintain, and use methods, processes, devices, and safeguards, including methods of sanitation and hygiene, that are reasonably necessary to protect the life, health, and safety of the employer's employees; and
 - iii. Take all other actions reasonably necessary to make the employment and place of employment safe.

Required Practices

- a. All private employers are to follow OSHA standards.

City Responsibilities

- a. Include provisions in contract to implement OSHA
- b. Cooperate with OSHA as necessary

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State or Local Preference

General. There cannot be any contract provisions that give bidders from a State or other political subdivision preference in bidding projects. The City shall not impose any requirement or enforce any procedure that operates to require the use, or provides a price differential in favor, of articles or materials produced within a State or other political subdivision. This includes requirements that prohibit, restrict or discriminate against the use of articles or materials shipped from or prepared, made or produced in any State, territory or possession of the U.S.

Materials produced within a designated area shall not be favored to the exclusion of comparable materials produced outside of the area. State and local preference clauses give particular advantage to the designated source and thus restrict competition. Therefore, preference provisions shall not be used on any Federal-aid construction projects.

This policy also applies to preference actions against materials of foreign origin, except as otherwise permitted by Federal law. Thus, the City cannot give preference to in-State material sources over foreign material sources. Under the Buy America provisions, the state or City is permitted to expand the Buy America restrictions provided that the state or City is legally authorized under State law to impose more stringent requirements.

Federal Regulation

a. 23 CFR 635.409 – There may not be any contract provisions which require the use of or provide a price differential in favor of articles or materials produced within the State.

State Regulation

- a. Government Code 2155.444 – State agencies must give preference to goods produced in Texas if the cost and quality are equal.
- b. Government Code 2155.449 – State agencies must give preference to goods produced in economically depressed or blighted areas if the cost and quality are equal.
- c. Transportation Code 223.045 - provides that contracts for the state highway system without federal funds must contain the same preference provisions for steel and steel products that are required under federal law for an improvement made with federal funds.

Required Practices

- a. For projects with federal funds, the City must comply with federal statute.
- b. For projects with state funds, but no federal funds, bid documents must contain provisions to assure compliance with Government Code 2155.444 and 2155.449. Use of contract requirements with preference for local materials must be approved by TXDOT/Grantor.
- c. For projects with no state or federal funds, the CITY may follow their own procedures.
- d. For projects with no federal funds but with state funds, the same preference provisions for steel and steel products that are required under federal law for an improvement made with federal funds.

City Responsibilities

- a. If federal funds are used, the City must assure there are no State or local preference provisions in their contracts.
- b. If state funds are used:
 - i. Send contract provisions to implement TGC 2155 for TXDOT concurrence.
 - ii. Request TXDOT/Grantor approval of local material preference if desired.

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Subcontracting

General. Federal regulations impose limitations on the amount of work than can be subcontracted. This provision prohibits a prime contractor from "brokering" (subletting all contract work). Subcontracting limitations are included in Form FHWA-1273. The following sections address the various parts of the regulation:

- ◆ Section VII.1. The contractor is required to perform work amounting to not less than 30 percent of the original contract amount, excluding specialty items, with his own organization. Specialty items are to be designated by the City and include items that require highly specialized knowledge, abilities or equipment. These items require highly specialized knowledge, abilities or equipment not ordinarily available in the type of contracting organization qualified and expected to bid on the contract.
- ◆ Section VII.2. This section clarifies that the contract amount indicated in Section VII.1. includes the cost of materials and manufactured products that are purchased or produced by the contractor.
- ◆ Section VII.3. The provisions of this section require the contractor to provide competent supervision of the project. The contractor must employ a superintendent or foreman who will have full authority to direct the work and be in charge of the operation.
- ◆ Section VII.4. No portion of the work may be sublet, assigned or otherwise subcontracted without the written consent of the City. Subcontract approval shall be based on satisfactory evidence that each subcontract is in writing and contains all the pertinent provisions, including insuring that the provisions of FHWA-1273 are physically a part of each subcontract. The approval of a subcontract does not relieve the contractor of responsibility for fulfillment of the contract.

Employee lease agreements have raised some issues. When a contractor enters an agreement with a firm to lease employees, does this constitute a subcontract and thus be subject to the 30% subcontract limitation? Employee lease arrangements are acceptable for Federal-aid projects if the leased employees are under the direct supervision and control of the contractor's superintendent and/or supervisor. Leased employees may be considered to be part of the prime's "own organization" if:

1. The prime contractor maintains control over the supervision of the day-to-day activities of the leased employees;
2. The prime contractor remains responsible for the quality of the work of the leased employees;
3. The prime contractor retains all power to accept or exclude individual employees from work on the project; and
4. The prime contractor remains ultimately responsible for the payment of predetermined minimum wages, the submission of payrolls, statements of compliance and all other Federal regulatory requirements.

The key issue is supervision and control of any leased personnel. If the leased personnel are treated as employees of the prime contractor and would be considered as such but for their

actual employment by a leasing agency, then for purposes of 23 CFR Section 635.116(a) they should be considered employees of the prime contractor's organization.

The FHWA requires each subcontract to be approved in writing by the City. This allows some control to screen subcontractors that are not qualified or that may be ineligible (e.g., debarred). It also assures that all Federal and State requirements will be included in the subcontract. In order to reduce the amount of paper flow, the FHWA Division Administrator may permit the City to satisfy the subcontract approval requirement by instituting a certification process. This process must require the contractor to certify that each subcontract arrangement will be in the form of a written agreement containing all the pertinent provisions and requirements of the prime contract. The City must demonstrate that it has an acceptable plan for monitoring such a certification.

Federal Regulation

- a. 23 CFR 633 – Contractors are required to include Form FHWA-1273 in all subcontracts.
- b. 23 CFR 635.116
 - i. Contractors must perform at least 30% of the work on a contract.
 - ii. Subcontractors are not allowed to perform work on a project until the subcontract has been approved in writing by the contracting entity.
- c. 23 CFR 635.116(d) – Applies to design-build contracts
 - i. The contracting entity may establish a percentage of work that must be performed by the design-builder. The 30% limitation does not apply.
 - ii. The only goals that maybe prescribed are those relating to the DBE program.

State Regulation

- a. Texas Administrative Code, Title 43, Chapter 9.54(c)(6)(A) - A HUB contractor or subcontractor may not subcontract more than 75% of a contract. The HUB shall perform not less than 25% of the value of the contract work.

Required Practices

- a. For all projects with federal funds, the City must adopt the TXDOT/Grantor Standard Specification Article 8.8, including 30% limitation, Form FHWA-1273, prompt pay, and other policies. The City will include TXDOT/Grantor's "Contractor's Assurance" document in all contract documents.
- b. For all projects with state funds, the 30% subcontracting limitation is reduced to 25% for HUB firms.
- c. For projects with state or federal funds, the City may not approve subcontracts with firms on the state or federal debarred list.
- d. For design-build projects, the 30% subcontracting limitation does not apply.
- e. For projects with no state or federal funds, the City may follow their own procedures.

City Responsibilities

- a. Adopt TXDOT/Grantor Standard Specification Article 8.8
- b. Include FHWA-1273 in contract
- c. Include Contractor's Assurance in bid documents
- d. Approve subcontracts in writing
- e. Assure subcontractor is not debarred
- f. Monitor 30% or 25% limitation

Termination of Contract

General. Federal-aid contracts exceeding \$10,000 must contain suitable provisions for termination by the City. The provisions must identify the manner by which the termination will be effected and the basis for settlement. Termination is an action taken by the contracting agency to cancel a contract. There may be a number of grounds to warrant termination, including termination for cause, termination for convenience and termination for default.

Prior to termination of a Federal-aid contract for which TXDOT/Grantor concurred in the award, the City shall consult with and receive the concurrence of TXDOT/Grantor. Federal-aid participation in a terminated contract is decided by the individual merits of the particular case. However, in no instance will Federal funds participate in any allowance for anticipated profits on work not performed.

If the City awards a contract for completion of a Federal-aid contract previously terminated for default, FHWA policy limits the amount eligible for Federal participation. The amount eligible is the lesser of the original contract or the sum of the new contract plus the payments made under the original contract.

Termination for Cause or Convenience. Terminations for cause or for convenience are for circumstance beyond the contractor's control. AASHTO lists the following conditions as grounds for termination for cause:

- ◆ Executive orders of the President for war, national defense or national emergency,
- ◆ Restraining orders or injunction obtained by third party action, or
- ◆ "Acts of God".

Grounds for termination for convenience include circumstances for which it is in the best interest of the contracting agency to cancel the contract.

In terminating a contract for cause or for convenience, the City gives written notice to the contractor, relieving him or her from further contractual obligation. The contractor will be paid for completed work, for work necessary to preserve and protect the completed work and for materials stockpiled for the project.

Termination for Default. Terminations for default are for circumstances that are deemed to be under the contractor's control. The AASHTO guide specifications include the following as circumstances for termination for default:

- ◆ Failure to begin work under the contract within the time specified in the "Notice to Proceed",
- ◆ Failure to perform the work with sufficient workmen and equipment or sufficient materials to assure the prompt completion of the project,
- ◆ Performance of the work not in conformance with the contract requirements or refusal to remove or replace rejected materials or unacceptable work,
- ◆ Discontinuance of the work,

- ◆ Failure to resume work which has been discontinued within a reasonable period of time after notice to resume,
- ◆ Committal of any act of bankruptcy or insolvency,
- ◆ Allowing any final judgment to remain unsatisfied,
- ◆ Making an assignment for the benefit of creditors, or
- ◆ Failure to comply with contract requirements regarding payment of minimum prevailing wages or EEO.

The specifications typically require notice to the contractor and surety of default considerations by the City. The notice gives the contractor and the surety a specified period of time, such as 10 days, to respond or to proceed with the work. If that period expires without response, the City may declare the contractor in default and notify the contractor and surety that the contractor is in default and the contract is void. The surety is then liable under conditions of the performance bond and must provide funds to complete the project, up to the full value of the bond. To avoid paying the bond, the surety may elect to assign another contractor to complete the work. However, if the surety is unable or unwilling to assign another contractor, the funds will be transferred to the City. If the surety awards a second contract, no action is required of FHWA or TXDOT/Grantor since the surety's contract is considered an extension of the original contract. However, if the City awards a contract to complete the work covered by a defaulted Federal-aid contract, normal Federal-aid procedures for PS&E advertising and award must be followed. The Federal-aid funding for the project will be limited to the lesser of the original contract value or the amount spent under the defaulted contract plus the second contract.

Federal Regulation

- a. 23 CFR 635.125 - Contracts exceeding \$10,000 must contain provisions for termination of a contract, including the manner by which the termination will be effected and the basis for settlement. In addition, such contracts must describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.
- b. 23 CFR 635.125 – Termination of a contract requires prior FHWA concurrence.

State Regulation

- a. No comparable state statutes.

Required Practices

- a. All projects with state or federal funds must have termination language in the contract to protect the state or federal interest. The City must adopt TXDOT Standard Specification Article 8.7 or submit alternate contract language for TXDOT/Grantor approval.
- b. For project with no state or federal funds, the City may use agency procedures.

City Responsibilities

- a. Adopt Article 8.7 of TXDOT/Grantor Standard Specs or develop comparable contract language for termination of contract and include in bid documents, request for proposals, or concessionaire agreement.
- b. Request TXDOT/Grantor approval of any termination action.

Time Extensions

General. Contract time extensions granted by the City that affect project costs or liquidated damages shall be subject to the concurrence of the granting agency and will be considered in determining the amount of Federal participation.

Events that are normally considered to be under the control of the contractor and, therefore, do not warrant a time extension includes:

- ◆ Shutdowns for maintenance,
- ◆ Breakdowns,
- ◆ Suspensions or stop work orders for violation of safety or pollution regulations,
- ◆ Shutdowns for construction accidents, and
- ◆ Material delays.

The FAPG (Non-regulatory Supplement 23 CFR 635A) provides further guidance on materials delays. The contractor is responsible for the timely order and delivery of materials for the project. A delay in delivery of materials does not in itself generally support an extension of contract time. However, if an unusual market condition (i.e., an industry-wide strike, natural disaster or area-wide shortage) occurs, a time extension may be in order.

Delays due to inclement weather should be expected and should generally not be the basis for a change in contract time. Weather should be factored into the original contract time determination.

Federal policy also covers granting time extensions due to utility, railroad and right-of-way (ROW) clearance delays. Because of the assurances required from the City prior to TXDOT/Grantor project authorization, the policy generally does not permit participation in time extensions for such delays. Whenever the railroad or utility is permitted to adjust its facilities coincidentally with contract operations, such activities must be clearly addressed in the contract provisions. All parties should understand that any interference by the railroad or utility to the contractor's operations generally would not constitute an allowable delay. In general, an extension of contract time due to ROW delays is very unusual and is the exception rather than the rule.

Federal Regulation

a. 23 CFR 635.121 – Time extensions for projects on the National Highway System are subject to approval by the FHWA and will be considered in the extent of federal participation.

State Regulation

a. No comparable state statutes.

Required Practices

a. For federally funded projects, the City must have TXDOT/Grantor approval of time extensions before granting the extension to the contractor.

b. For all other projects, the City may follow agency practice.

City Responsibilities

- a. Gain TXDOT/Grantor concurrence of time extensions.
- b. Follow terms of agreement with TXDOT/Grantor.

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Equal Employment Opportunity (Title VI Compliance)

General. Title VI of the Civil Rights Act of 1964 is the federal law that states “No person in the United States shall, on the grounds of race, color, or national origin be excluded from participation in, be denied the benefits of, or be otherwise subjected to discrimination under any program to which this part applies.” Additional regulations and statutes broadened nondiscrimination to include religion, sex, age, retaliation and disability.

The two main authorities enabling Title VI implementation, compliance and enforcement are the Civil Rights Act of 1964 and the Civil Rights Restoration Act of 1987. Various other statutes, laws and regulations, executive orders and the United States Constitution provide guidance for the effective execution of the objectives of Title VI. These include, but are not limited to the:

- ◆ Federal-Aid Highway Act of 1973
- ◆ Section 504 of the Rehabilitation Act of 1973
- ◆ Americans with Disabilities Act of 1990
- ◆ Age Discrimination Act of 1975
- ◆ Executive Order 12898: Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations
- ◆ Executive Order 13166: Improving Access to Services For Persons With Limited English Proficiency

Pursuant to Title VI of the Civil Rights Act of 1964, as amended, the Restoration Act of 1987 and other nondiscrimination authorities; discrimination based on race, color, national origin, sex, age or disability shall not occur in connection with any of its programs or activities. Any recipient or subrecipient receiving Federal financial assistance shall adopt this assurance or provide one in accordance with 49 CFR Part 21.7 and follow all applicable laws, regulations and guidance including 49 CFR Part 21 and 23 CFR Part 200.

Federal Regulations

- a. 49 CFR Part 21: Nondiscrimination in Federally-Assisted Programs of the Department of Transportation
- b. 23 CFR Part 200: Title VI Program and Related Statutes – Implementation and Review Procedures

State Regulations

- a. a. Texas Administrative Code, Title 43 §9.4: Civil Rights--Title VI Compliance

Required Practices

- a. Pursuant to 23 USC 302, the FHWA’s primary recipient is the State Highway Transportation Agency. In Texas, TXDOT is that primary recipient. TXDOT and its subrecipients and contractors, irrespective of tier, are required to prevent discrimination and ensure nondiscrimination in all programs and activities whether they are federally funded or not.
- b. Subrecipients of federal financial assistance include, but are not limited to cities, counties, contractors, consultants, suppliers, universities, colleges and planning agencies. TXDOT and/or the FHWA will address any discovered instance of discriminatory distribution of program access

to or use of services and benefits. Program, facility, and records access shall be granted at any time to TXDOT, the State Auditor's Office, the USDOT and other federal agencies to assure compliance with these regulations.

c. A Title VI complaint may be filed by any individual or individuals who allege they have been subjected to discrimination or adverse impact under any TXDOT program or activity based on race, color, national origin, sex, age, religion or disability. The complaint must be filed within 180 days of the date of the alleged act of discrimination.

City Responsibilities

The City should provide methods of administration designed to ensure that they and all subrecipients comply with Title VI and remedy any existing compliance problems. The minimum components of this requirement are:

- a. Develop specific outreach plan for notifying subrecipients through meetings, written documents of the Title VI requirements that apply to the federally-funded State program.
- b. Provide training for local program staff, subrecipients in the Federal agency's nondiscrimination policies and procedures.
- c. Establish procedures for processing complaints, notifying TXDOT/Grantor and the FHWA, and informing beneficiaries of their right to file an external complaint of discrimination.
- d. Develop a program to assess and report on the status of their Title VI compliance.
- e. Establish plans for bringing discriminatory programs into compliance within a specified time period.
- f. Assist the TXDOT/Grantor Office of Civil Rights in the Title VI review of the City and subrecipient contractor program areas and activities. Revise where applicable, policies and procedures and directives to include Title VI requirements.
- g. Distribute policy statement which expresses the City's commitment to the nondiscrimination provisions of Title VI. The policy statement shall be circulated throughout the recipient's organization and to the general public. Such information shall be circulated where appropriate in languages other than English.
- h. Take affirmative action to correct any deficiencies found by the Federal Highway Administration within a reasonable time period, not to exceed 90 days, in order to implement Title VI compliance.
- i. Process complaints of discrimination consistent with the City's procedures. External complaints of discrimination shall be forwarded to TXDOT/Grantor's Office of Civil Rights for investigation. Investigations shall be conducted by the Office of Civil Rights personnel trained in discrimination complaint investigations.
- j. Collect statistical data (race, color, national origin, sex, age, disability) of participation in, and beneficiaries of the programs and activities conducted by the recipient.
- k. Participate in training program on Title VI and related statutes.
- l. Prepare a yearly report of Title VI accomplishments for the past year and goals for the next year.
- m. Distribute Title VI information for dissemination to the general public and when appropriate, in languages other than English.
- n. Establish procedures to identify and eliminate discrimination when found to exist.
- o. Provide City's program to TXDOT/Grantor for review.

Trench Safety

General. According to OSHA, dozens of people are killed each year and hundreds are injured. OSHA has established several trench safety requirements such as:

- Trenches 5 feet deep or more require a trench protection system.
- Trenches 20 feet deep or more require that the trench protection system be designed by a registered professional engineer.
- Allowable trench protection systems include:
 - Sloping protects workers by cutting back the trench wall at an angle inclined away from the excavation.
 - Shoring protects workers by installing aluminum hydraulic or other types of supports to prevent soil movement.
 - Shielding protects workers by using trench boxes or other types of supports to prevent soil cave-ins.
 - OSHA standards require that trenches be inspected daily and as conditions change by a competent person prior to worker entry to ensure elimination of excavation hazards.

To assure that trench safety receives the attention it deserves, Health and Safety Code, § 756 outlines several construction project requirements.

Federal Regulation

a. No comparable statute. There is no federal requirement for there to be a bid item for trench safety. However, various trench safety measures are required by OSHA. Refer to the contract requirement “Safety: Accident Prevention (OSHA).”

State Regulation

a. Health and Safety Code, § 756.022. Trench Excavation in State requires that any bid documents (if bid documents are used) and the construction contract contain the following provisions for any trench excavation exceeding a depth of 5 feet.

- i. A reference to the Occupational Safety and Health Administration standards for trench safety,
- ii. A copy of special shoring requirements, if any, of the state or of a political subdivision in which the construction project is located, with a separate pay item for the special shoring requirements,
- iii. a copy of any geotechnical information that was obtained by the CITY for use in the design of the trench safety system; and
- iv. a separate pay item for trench excavation safety protection.

b. Health and Safety Code, § 756.023. Trench Excavation for Political Subdivision requires the same bid and contract provisions as § 756.022 plus additional requirements for cities and counties.

Required Practices

a. Requirements of Health and Safety Code, § 756.022 applies to all projects with state or private funding whether on-system or off-system.

- b. Requirements of Health and Safety Code, § 756.023 applies to all projects with City or county funding whether on-system or off-system.
- c. Impose Health and Safety Code, § 756.022 regardless of funding.

City Responsibilities

- a. Include the required provisions in the bid documents.

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Warranties and Warranty Clauses

General. With certain limitations, warranties may be specified. Prior to 1991, the FHWA had a longstanding policy that restricted the use of warranties on Federal-aid projects to electrical and mechanical equipment. The rationale for the restriction was that such contract requirements may indirectly result in Federal-aid funds participating in maintenance costs. The use of Federal-aid funds for routine maintenance is prohibited by law.

On August 25, 1995, FHWA published an Interim Final Rule (IFR) for warranties related to projects on the National Highway System. The IFR states that warranty provisions shall be for a specific construction product or feature. Routine maintenance items are still ineligible. The warranty Final Rule was published in the April 19, 1996 Federal Register and became 23 CFR 635.413.

The City may include warranty provisions in NHS construction contracts in accordance with the following:

- ◆ Warranty provisions shall be for a specific construction product or feature. A general warranty for the entire project is unacceptable since the contractor does not control the design process or make decisions during that phase.
- ◆ Warranties may not cover items of maintenance ineligible for Federal participation. An example of this might be a warranty for guardrail construction where it would be inappropriate to warrant routine damage done to the guardrail by vehicle impacts.
- ◆ Contractors are not to be required to warrant items over which they have no control. An example of this might be a warranty for asphaltic concrete pavement. It would be appropriate for the contractor to warrant the smoothness of the pavement or the rutting performance, but inappropriate to warrant reflective cracking that might occur due to preexisting underlying layers regardless of how well the contractor constructs the new pavement.
- ◆ All warranty requirements and subsequent revisions shall be submitted to TXDOT/Grantor for advance approval.
- ◆ The City may follow TXDOT/Grantor procedures regarding the inclusion of warranty provisions in non-NHS Federal-aid contracts.

Currently the regulations do not restrict the duration of the warranty. However, practical experience has shown that two to five year warranties are common, and warranties beyond five years may not be as cost effective due to bonding and/or surety concerns. Warranty provisions have been used for asphalt concrete pavements, bridge painting, traffic striping and bridge expansion joints.

Federal Regulation

a. 23 CFR 635.413 – For projects on the National Highway System, warranty provisions may be used for a specific product or feature. Warranties for the entire project are not acceptable. Contractors may not be required to warrant items over which they do not have control.

b. 23 CFR 635.413(e) – For design-build projects on the National Highway System, regulatory changes are appropriate:

- i. General project warranties may be used with limitations.
- ii. Contracting entities may allow proposers to submit alternate warranty proposals for determination of best value.

State Regulation

- a. No comparable state statute.

Required Practices

- a. For projects with state or federal funds, the City must submit warranty procedures, including contract language, for TXDOT/Grantor approval.
- b. For projects with no state or federal funds, the City may use agency procedures.

City Responsibilities

- a. Submit warranty procedures to TXDOT/Grantor for approval.
- b. For concessions, follow terms of agreement.

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SECTION 3.3

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Addenda

General. All bidders must bid the project on the same or comparable basis, so that no particular advantage or disadvantage accrues to any potential bidder or to the City. Since an addendum issued during an advertisement period could have a profound impact, not just on bid prices, but also on the basis for bid comparisons, all prospective bidders must be made aware of any addendum as expeditiously as possible.

The definition of "expeditious," in terms of an adequate time frame to get an addendum out to all prospective bidders prior to the bid opening, is subjective. Each case should be judged on the complexity of the addendum. The most important consideration in an addendum process is to give all potential bidders enough time to fully evaluate the effect of the changes and to adjust their bid accordingly. The City should develop policy guidance that identifies an adequate time frame.

Since an addendum constitutes a deviation from the TXDOT/Grantor-approved PS&E, the obligation of Federal-aid funds may be impacted by the change. Therefore, TXDOT/Grantor must approve an addendum prior to release to the prospective bidders. Any approval or concurrence will be based on the City's assurance that all potential bidders will receive the approved addendum.

Federal Regulation

- a. 23 CFR 635.112(c)
 - i. Addenda which contain a major change to the plans and/or specifications must be approved by FHWA/TXDOT/Grantor prior to release to prospective bidders.
 - ii. Minor addenda must be identified prior to, or with the request for concurrence in award.
 - iii. Addenda must be sent to all bidders.
 - iv. Bidders must acknowledge receipt of all addenda. Failure to acknowledge addenda renders a bid non-responsive.
- b. 23 CFR 635.112(i)(3) – design-build
 - i. Addenda that result in major changes to the Request for Proposals must be approved by FHWA/TXDOT/Grantor prior to release to offerors.
 - ii. Addenda must be sent to all offerors.
 - iii. The CITY must provide assurance that all offerors received all addenda prior to requesting concurrence in award.
- c. CFR 635.114 (b)
 - i. FHWA must formally concur in the award of all Federal-aid contracts. This is a prerequisite to Federal participation in construction costs and is considered as authority to proceed with construction, unless specifically stated otherwise. Concurrence in award shall be formally approved and shall only be given after receipt and review of the tabulation of bids.

State Regulation

a. Local Government Code 271.0065 - All bidders must have the opportunity to bid on the same items on equal terms. (Applies to municipalities, counties, and other local governments)

Required Practices

- a. For projects with federal funds, TXDOT/Grantor must concur in the award.
- b. For all projects on the state system, projects with federal or state funds, or projects administered by a Regional Mobility Authority, all addenda must have TXDOT/Grantor approval prior to award of the contract. "Major" addenda must be approved by TXDOT/Grantor prior to release to prospective bidders/offerors. "Minor" addenda may be approved by TXDOT/Grantor after release to bidders but prior to award of contract. Minor addenda includes minor quantity changes and correction of obvious errors, but does not include changes to geometric features, approved specifications, or safety appurtenances. The City should verbally advise TXDOT/Grantor of any proposed addenda before release to prospective bidders/offerors to avoid potential participation issues.
- c. For projects that do not have state or federal funds, are not on the state system, the City should follow their own procedures. The City does not have to get TXDOT/Grantor approval of addenda.
- d. For concessionaire projects that include long-term maintenance by the concessionaire (20 years or more), major addenda do not have to be approved by TXDOT/Grantor prior to release. All addenda must be approved by TXDOT/Grantor before award of contract.

City Responsibilities

- a. Request formal concurrence in award from TXDOT/Grantor. The request must include the tabulation of bids.
- b. Secure TXDOT/Grantor approval of "major" addenda prior to release.
- c. Assure all addenda available to all bidders/offerors.
- d. Secure TXDOT/Grantor approval of "minor" addenda prior to contract award.

Advertising

General. An advertisement is the official announcement inviting bids for construction work. Certain requirements must be fulfilled before the official advertisement is issued. In Texas, advertisement of a contract proposal legally takes the form of a classified advertisement. Advertisements must be in the county in which the work is to take place and in two other newspapers, and run weekly at least two weeks prior to bid opening. If the contract is estimated to involve less than \$300,000, notice may be published in only two successive issues of a newspaper published in the county in which the improvement is to be made. Other forms to announce upcoming projects may include advertisements in trade journals, bulletins and mailed notices to potential bidders. These other forms of advertisement can attract greater attention and, thereby, enhance competition. However, the notice in a newspaper is considered the legal advertisement.

The City may only advertise a project following TXDOT/Grantor's approval of the PS&E package. TXDOT/Grantor authorization will be based on the assurances prescribed in 23 CFR 635.309, which include:

- ◆ PS&E approval;
- ◆ Assurances that all right-of-way clearances (including encroachments on the right-of way), utility, and railroad work have been completed, or that arrangements have been made for coordination during construction with proper notice provided in the bid proposal;
- ◆ Assurances for relocation of individuals and families, when applicable;
- ◆ Assurances that the public hearing process and location and design approval requirements have been met; and
- ◆ Assurances, where applicable, that required area-wide agency reviews have been accomplished.

The City's advertising policy and practices must assure free and open competition. This policy includes issues concerning licensing, bonding, prequalification, and bidding, as well as, the announcement itself in relation to Title VI Nondiscrimination, with regard to age, race, religion, color, sex, national origin, disability, etc.

The minimum advertisement period is three weeks. With approval by TXDOT/Grantor, exceptions are permitted where circumstances warrant. For large or complex projects, the advertisement period should be greater than three weeks to permit prospective bidders adequate time to prepare a responsive bid proposal. Scheduling a pre-bid meeting to address prospective contractors concerns and questions is considered good industry practice.

The City shall continue to accept bids or proposals or other applicable expressions of interest for the contract for at least 21 calendar days after the date the City first posted notice of the contract in accordance with the requirements listed above, or 14 calendar days after the date the City first posted the entire bid or proposal solicitation package. The minimum posting requirements do not apply in an emergency requiring the City to make the procurement more

quickly to prevent a hazard to life, health, safety, welfare or property or to avoid undue additional cost.

The Transportation Code §223.002 stipulates that notice of the time and place at which bids will be opened for a contract and the contract awarded be published in a newspaper published in the county in which the improvement is to be made once a week for at least two weeks before the time set for awarding the contract and in two other newspapers that the City may designate. If the City estimates that the contract involves an amount less than \$300,000, notice may be published in two successive issues of a newspaper published in the county in which the improvement is to be made; no further advertisement is needed. If a newspaper is not published in the county in which the improvement is to be made, notice shall be published in a newspaper published in the county nearest the county seat of the county in which the improvement is to be made; and in which a newspaper is published.

The Government Code §2155.083 requires that all state agency contracts involving more than \$25,000 be posted in the in Electronic State Business Daily maintained by the Office of the Comptroller. This requirement does not apply to the City. However, the City should consider posting these contracts in the Electronic State Business Daily. If the City chooses to perform this posting, the City must post in the business daily either the entire bid or proposal solicitation package or a notice that includes all information necessary to make a successful bid, proposal, or other applicable expression of interest for the procurement contract, including at a minimum the following information:

- ◆ A brief description of the goods or services to be procured and any applicable state product or service codes for the goods and services;
- ◆ The last date on which bids, proposals, or other applicable expressions of interest will be accepted;
- ◆ The estimated quantity of goods or services to be procured;
- ◆ If applicable, the previous price paid by the state agency for the same or similar goods or services;
- ◆ The estimated date on which the goods or services to be procured will be needed; and
- ◆ The name, business mailing address, and business telephone number of the state agency employee a person may contact to inquire about all necessary;
- ◆ Information related to making a bid or proposal or other applicable expression of interest for the contract.

Federal Regulation

- a. 23 CFR 635.112 contains the following requirements:
 - i. Projects may not be advertised for receipt of bids until a Letter of Authority is issued by the FHWA.
 - ii. The advertisement and the approved PS&E must be available a minimum of three weeks before bid opening.
 - iii. For design-build, FHWA's approval of the Request for Proposals has the same significance as PS&E approval.

State Regulation

- a. Local Government Code 252.041 (municipalities) - The Municipality must place a weekly advertisement in a newspaper published in the municipality at least two weeks before bid opening.
- b. Local Government Code 262.025 (counties) – The County must place a weekly advertisement in a newspaper of general circulation in the county at least two weeks before bid opening.
- c. Local Government Code 271.025 (municipalities, counties, and other local governments) – Governmental entities must advertise for bids. If no other law prevails, the advertisement must be published in a newspaper of general circulation in the area at least twice on or before the tenth day before the first date bids may be submitted.
- d. Local Government Code 271.184 – Design-build projects must be advertised including time and place of bid opening according to any manner prescribed by law.
- e. Government Code 2155.083 – Procurements over \$25,000 by all state agencies must be placed on the Comptroller’s Electronic State Business Daily web site a minimum of 21 days prior to bid opening.
- f. Transportation Code 223.002 – For projects let by TXDOT. This statute does not apply to other entities.
 - i. Advertise the place and time bids are to be opened and read.
 - ii. For contracts estimated at \$300,000 or above, advertisements in newspapers need to be in the county in which the work is to take place, and in two other newspapers (total of three newspapers). For contracts estimated to be less than \$300,000, advertisements should be published twice in the county where the work is to take place.
 - iii. The newspaper advertisements must be placed at least two weeks prior to bid opening and run each week.
 - iv. If a newspaper is not published in the county in which the work is to be done, advertisements need to be published in a newspaper published in the county:
 1. Nearest the county seat of the county in which the work is to be done; and
 2. In which a newspaper is published.
- g. Transportation Code 223.203(c) – For design-build, TXDOT/Grantor must publish a notice advertising a request for competing proposals and qualifications in the Texas Register. This Regulation does not apply to other entities.

Required Practices

- a. For projects with state or federal funds, the City may not advertise for receipt of bids until so authorized by TXDOT/Grantor. If the project has federal funds, authorization from TXDOT/Grantor will be after FHWA issues a Letter of Authority.
- b. For projects with federal or state funds, the City is encouraged to follow the provisions of Transportation Code 223 and Government Code 2155.083. (Electronic State Business Daily, number and location of newspapers)
- c. For projects with no federal or state funds, the City may follow their own advertising procedures. The City is encouraged to use the Electronic State Business Daily.
- d. Concessionaires will follow TXDOT practices on projects where TXDOT is the administrator.

City Responsibilities

- a. Advertising must be after TXDOT/Grantor authorization.
- b. Advertise a minimum of 3 weeks in advance of bid opening.
- c. Advertise in the number of newspapers and issues applicable to the local entity and consider using Electronic State Business Daily.
- d. For design-build follow provisions in the approved solicitation.

TXDOT/Grantor Responsibilities

- a. General
 - i. For projects with state or federal funds, review the City's process for advertising for compliance with the applicable statutes and policy statements.
 - ii. For projects with state or federal funds, check that the advertisement is not listed in the Electronic State Business Daily, newspapers, or other advertising medium before the City receives authorization from TXDOT/Grantor.
 - iii. There is no monitoring on projects without state or federal funds.
- b. Design-bid-build – For projects with state or federal funds, spot check newspaper advertisements for compliance with statutes (content of advertisement, number of newspapers, and area of circulation).
- c. Concessionaire – Monitor advertising for compliance with the concessionaire agreement.

Bid Analysis and Contract Award

General. Bid analysis is the basis for justifying contract award or rejection of the bids. A proper bid analysis helps to ensure that funds are being used in the most effective manner. Contract award is the commitment to go forward with the project.

Bid Analysis. The engineer's estimate is part of the PS&E. One of the purposes of the estimate is to serve as a guide to analyze bids. The estimate should be accurate, credible and based on realistic data. TXDOT/Grantor maintains written procedures for justifying the award of a contract, or rejection of the bids, when the low bid appears excessive or rejection is being considered for other reasons. *(Please refer to TXDOT's Letting Manual for more information).*

The bid analysis process, pursuant to 23 CFR 635.114(c), is an examination of the unit bid prices for reasonable conformance with the engineer's estimated prices. Beyond the comparison of prices, other factors that a bid analysis may consider include:

- ◆ Number of bids,
- ◆ Distribution or range of the bids,
- ◆ Identity and geographic location of the bidders,
- ◆ Urgency of the project,
- ◆ Unbalancing of bids,
- ◆ Current market conditions and workloads,
- ◆ Comparison of bid prices with similar projects in the letting,
- ◆ Justification for significant bid price differences,
- ◆ Potential for savings if the project is re-advertised, and
- ◆ Other factors as warranted.

Not all of these factors need to be considered for bids that indicate reasonable prices or show good competition. However, when the low bid differs from the engineer's estimate by an unreasonable amount, a thorough analysis of all bids should be undertaken to justify award of the contract. In order to justify award of a contract under these circumstances, the following questions should be considered:

- ◆ Was competition good?
- ◆ Is the timing of the project award critical?
- ◆ Would deferral be contrary to the public interest?
- ◆ Would re-advertisement result in higher or lower bids?
- ◆ Was there an error in the engineer's estimate?

Unbalanced Bids. Perform an analysis of the tabulations and the project estimate to determine the presence of unbalanced bids. As defined in 23 CFR 635.102, the two types of unbalanced bids are:

- A mathematically unbalanced bid is a bid that contains lump sum or unit bid items that do not reasonably reflect the actual costs (plus reasonable profit, overhead costs, and other indirect costs) to construct the item, while

A materially unbalanced bid is a bid that generates reasonable doubt that award to that bidder would result in the lowest ultimate cost to the Government. A materially unbalanced bid should not be awarded.

The City must obtain TXDOT/Grantor concurrence on the determination of whether or not a bid is unbalanced.

To detect mathematical unbalancing, the unit bid items will be evaluated for reasonable conformance with the engineer's estimate and compared with the other bids received. There are no definitive parameters (e.g., an amount or percent of variance from the engineer's estimate) that constitute an unbalanced bid. The degree of unbalancing of a bid may depend on the reason for the unbalancing.

There may be situations where the quantity of an item could vary due to inaccuracies in the original quantity or cost estimating, errors in the plans, changes in site conditions or design, etc. In these situations, the bids will be further evaluated to determine if the low bidder would ultimately yield the lowest cost. If unbalancing creates reasonable doubt that award would result in the lowest ultimate cost, the bid is materially unbalanced and TXDOT/Grantor will recommend rejection or other steps to be taken to protect the government's interest.

Transportation Code §223.0041 stipulates that award of a contract must be made to the lowest bidder. This award is however, subject to the federal Buy America provisions in accordance with Transportation Code §223.045.

Concurrence in Award. Concurrence in contract award is not just a formality; it is the authorization to proceed with construction.

The City must formally request concurrence by TXDOT/Grantor in the award of contracts. The basic policy is explained in 23 CFR 635.114(a): "Federal-aid contracts shall be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria of responsibility as may have been established by the STD [City] in accordance with 23 CFR 635.110. Award shall be within the time established by the STD [City] and subject to the prior concurrence of the Administrator [TXDOT/Grantor]."

The regulations, 23 CFR 635.114(b), further state that: "Concurrence in award ...is a prerequisite to Federal participation in construction costs and is considered as authority to proceed with construction, unless specifically stated otherwise."

TXDOT/Grantor's concurrence shall be formally documented in writing and shall include any qualifying statements concerning the concurrence. Verbal concurrence in award must be avoided and should only be used in unusual circumstances. Verbal concurrence must be documented and should be followed by a written concurrence in award that reflects the date of verbal concurrence.

When the City determines that the lowest bidder is not qualified, 23 CFR 635.114(f) requires that: "If the STD [City] determines that the lowest bidder is not responsive or the bidder

is not responsible, it shall so notify and obtain the Administrator's [TXDOT/Grantor's] concurrence before making an award to the next lowest responsible bidder."

23 CFR 635.114(h) covers the situation when the City makes a decision to reject all bids: "Any proposal by the STD [City] to reject all bids received for a Federal-aid contract shall be submitted to the Administrator [TXDOT/Grantor] for concurrence, accompanied by adequate justification."

To insure the sanctity of the low-bid system, the FHWA Contract Administration Core Curriculum states "The act of a contracting agency negotiating with an apparent low bidder prior to award is defined as "bid rigging in reverse," and is expressly prohibited by 23 CFR 635.113(a)."

Add Alternates. Many architectural projects use the concept of "add or deductive alternates". This concept allows the owner to maximize available funding. While the concept is not normally associated with Federal-aid Highway projects, it may be used if the alternates are listed in the proposal in priority order, with an explanation to all bidders of how the alternates will be used to determine the low bidder and contract award.

Federal Regulation

a. 23 CFR 635.113(a)

i. Negotiation with contractors, during the period following the opening of bids and before the award of the contract shall not be permitted.

b. 23 CFR 635.114

i. Contracts must be awarded only on the basis of the lowest responsive bid submitted by a bidder meeting the criteria of responsibility as may have been established in accordance with Sec. 635.110.

ii. Award is subject to the prior concurrence of FHWA (TXDOT/Grantor may act on behalf of FHWA on certain projects). Prior concurrence is a condition of federal participation.

iii. Bids shall be evaluated for conformance with the engineer's estimate. Extreme variations and obvious unbalancing shall be thoroughly evaluated to assure good competition and the lowest possible price was received.

iv. The request to concur in award of an unbalanced bid must be supported by written justification.

v. Decisions to either award to other than the low bidder or reject all bids must be have prior FHWA (TXDOT/Grantor) concurrence.

c. 23 CFR 635.114(k) – Design-build contracts shall be awarded in accordance with the Request for Proposals.

d. 23 CFR 636 – Design-Build

i. Subpart B lists acceptable procedures for selection and award of design-build projects.

ii. Award is based on "best value" evaluated using the criteria established in the Request for Proposals.

State Regulation

- a. Texas Administrative Code Title 43, §9.15(e) – Requires that TXDOT/Grantor examine low bids for reasonable conformance with TXDOT/Grantor’s estimate. Bidders found to have submitted a materially and mathematically unbalanced bid will not be allowed to submit future bids on the same project.
- b. Transportation Code 223.0041 – TXDOT contracts shall be awarded to the lowest bidder.
- c. Local Government Code 252.043 – Requires a municipality to award a contract to the bidder that provides the best value. Includes factors that may be considered in “best value” determination.
- d. Local Government Code 252.0435 – Allows a municipality to consider a bidder’s safety record if:
 - i. The governing body has adopted a written definition and criteria for accurately determining the safety record of a bidder;
 - ii. The governing body has given notice to prospective bidders in the bid specifications that the safety record of a bidder may be considered in determining the responsibility of the bidder; and
 - iii. The determinations are not arbitrary and capricious.
- e. Local Government Code 252.0436 – Allows a municipality to refuse award of a contract to a bidder indebted to the municipality.
- f. Local Government Code 262.027 - Requires a County commissioner’s court to award contract to “lowest and best” bid or reject all bids and publish a new notice.
- g. Local Government Code 262.0271 – Allows a County to give preference to a bidder who provides health insurance comparable to health insurance for county employees.
- h. Local Government Code 262.0275 – Allows a County to take into account the safety record of the bidder if:
 - i. The commissioners court has adopted a written definition and criteria for accurately determining the safety record of a bidder;
 - ii. Prospective bidders are given notice in the bid specifications; and
 - iii. The determinations are not arbitrary and capricious.
- i. Local Government Code 262.0276 – Allows a County to refuse award of a contract to a bidder indebted to the county.
- j. Local Government Code 262.0305 – Allows a County to negotiate modifications after award if in the best interest of the county.
- k. Local Government Code 271.0065 – Requires a County to provide potential bidders the opportunity to have their bid judged to the same standards.
- l. Local Government Code 271.027 – Requires a County to award contracts to the lowest responsible bidder. Also allows a bidder to demonstrate responsibility after opening and before award to another bidder.
- m. Local Government Code 271.192 - For design-build projects the City must select a design-build firm using a combination of technical qualifications and cost.
- o. Transportation Code 366.185 – A Regional Tollway Authority must award noncontracts by a competitive bidding procedure where the contract is awarded to the lowest responsible bidder that meets the Authority’s criteria.
- p. Transportation Code 370.184 – A Regional Mobility Authority must adopt rules governing award of contracts.

q. Transportation Code 370.312 – A Regional Mobility Authority must adopt rules governing selection of private partnerships.

Required Practices

- a. For all projects with federal and/or state funds and all projects on the state highway system, the City must have TXDOT/Grantor concurrence in award before awarding a contract. If an issue occurs at letting, the City should be informed the issue jeopardizes reimbursement and therefore the City should remedy the issue.
- b. For all projects with federal and state funds, the City must develop specific criteria for determining a “responsible / responsive bidder”. The language must address statutory options, such as “best bid”, “best value”, and “safety record”. TXDOT/Grantor approval of the criteria is required and the criteria must be included in bid documents. In addition, the City must have a procedure satisfactory to TXDOT/Grantor to determine and evaluate “materially and mathematically unbalanced bids”.
- c. For projects with federal and state funds, the provisions of Local Government Code 271.027 allowing a bidder to demonstrate responsibility after bid opening does not apply since 3.b. provides for developing contract language before advertising a contract for receipt of bids.
- d. For projects with no federal or state funds, the City may award contracts without prior TXDOT/Grantor concurrence following their applicable procedures.

City Responsibilities

- a. Develop definition of responsible / responsive bidder for TXDOT/Grantor approval and include in bid documents.
- b. Establish low bid criteria if add alternates are used.
- c. Evaluate bids.
- d. Determine lowest responsible / responsive bidder.
- e. Obtain TXDOT/Grantor concurrence on the determination of whether or not a bid is unbalanced.
- f. Request concurrence in award.
- g. Proceed with contract execution after notification of concurrence
- h. For design-build, submit procurement procedures to TXDOT/Grantor for approval.
- i. For design-build, evaluate offers for compliance with rules.
- j. Request TXDOT/Grantor concurrence in award.
- k. For off-system projects with no federal or state funds, follow local procedures.

Bid Opening and Tabulation

General. The bid opening is a public forum for the announcement of all bids, and is that point in time where the bids are opened and read aloud. Bid tabulations provide a means of evaluating bids and as a mechanism for tracking construction costs.

Bid opening. State and Federal Grantors (FHWA, etc.) policy requires all bids to be opened publicly and read aloud either item-by-item, or by total amount.

Reasons for not reading a bid include the bid itself being unresponsive, often called "irregular", or the bidder is determined not responsible. The differences between a responsive bid and responsible bidder are as follows:

- ◆ A responsive bid is one that meets all the requirements of the advertisement and proposal, while
- ◆ A responsible bidder is one who is physically organized and equipped with the financial wherewithal to undertake and complete the contract.

Some reasons for not reading a bid due to bidding irregularities may include:

- ◆ Failure to sign the bid,
- ◆ Failure to furnish the required bid bond,
- ◆ Failure to include a unit bid price for each item,
- ◆ Failure to acknowledge all addenda,
- ◆ Failure to include a total amount for the bid,
- ◆ Failure to submit a non-collusion affidavit,
- ◆ Failure to commit to the achievement of the DBE contract goals or demonstrate good faith efforts to do so, or
- ◆ Inclusion of conditions or qualifications not provided for in the specifications.

The above examples do not include all possible bidding irregularities. The City's specifications will define what constitutes a bidding irregularity. Therefore, the City's bidding documents must clearly identify those requirements with which the bidder must comply to have a responsive bid.

Just as the bid may be rejected for being irregular or unresponsive, an apparent low bid may also be rejected on the grounds that the bidder is not a responsible bidder. A bidder may be deemed not responsible because of past unsatisfactory performance, as evidenced by failure to meet the City's qualification requirements, or because of State or Federal suspension/debarment action. A determination of non-responsibility by the City should be documented in writing and the contractor should be given "due process" to respond to such charges. A determination of non-responsibility should be done prior to the receipt of bids. While 49 CFR 29.510(b)(2) indicates that participants may not be required to check the Excluded Parties List System, the City is highly encouraged to develop a procedure for verifying the eligibility of participants prior to the award of the contract.

In summary, a successful bid opening should identify the responsible bidder submitting the lowest, responsive bid.

While FHWA does not have specific policies on how a bid opening should be conducted, the competitive bidding policy relies on the phrase in 23 CFR 635.113 that "... all bids ... shall be publicly opened and announced ...". In common terms, "publicly opened" means being opened in front of the "public" - particularly those people who are stakeholders in the letting. The specific details of the advertisement and bid opening procedures are governed by State statute.

Bid tabulations. As a basis for tracking current construction costs and forecasting future construction costs, the City must provide bid tabulation data to TXDOT/Grantor.

Combined Certifications/Signature Sheets. Frequently, bids are rejected as non-responsive because the contractor inadvertently failed to sign one of the many certifications required. In an effort to maximize competition, some entities use either a combined certification sheet or include in the bid proposal packet a detailed listing of the certifications that are required and their location within the packet.

Transportation Code §223.004 requires that all bids be sealed and filed with the City. The bids must be opened in a public meeting allowing attendance by all interested bidders. All bids must be opened in the presence of any interested bidders.

Federal Regulation

- a. 23 CFR 635.113 – design-bid-build
 - i. All bids received must be publicly opened and read. If a bid is received and not read, the bidder's name must be identified and the reason for not reading the bid must be announced.
 - ii. Negotiating with contractors between bid opening and contract award is prohibited.
 - iii. For projects on the National Highway System, a tabulation of bids must be submitted to FHWA.
- b. 23 CFR 635.113 – design-build
 - i. All proposals received must be opened and reviewed in accordance with the terms of the solicitation.
 - ii. For projects on the National Highway System, a post-award tabulation of proposal prices must be submitted to FHWA.

State Regulation

- a. Local Government Code 252.041 – A municipality must publish a notice that contains the time and place bids will be publicly opened and read.
- b. Local Government Code 252.0415 – A municipality may receive bids electronically if the municipality adopts rules to assure confidentiality until opening.
- c. Local Government Code 262.025 – A county must publish a notice that contains the time and place bids will be received and opened. (Does not mention public opening).
- d. Local Government Code 262.026 – A county official must open bids on the date specified in the notice. All bids must be opened at the same time.

- e. Local Government Code 271.026 – A county may open bids only at a public meeting or in a County office.
- f. Local Government Code 271.184 – Design-build projects must be advertised including time and place of bid opening according to any manner prescribed by law.
- g. Local Government Code 271.192 – For design-build projects the City must select a design-build firm using a combination of technical qualifications and cost.
- h. Texas Administrative Code Title 43, §26.33(g) – Requires that a Regional Mobility Authority use TXDOT/Grantor specifications or approved alternate specifications for projects that connect to, or are on, the state highway system.
- i. Texas Administrative Code Title 43, §27.56(c)(3) – Requires that requestors use TXDOT/Grantor specifications or approved alternate specifications for toll projects that include state funds. TXDOT/Grantor may consider alternative specifications if a project is not intended to become part of the state highway system or otherwise under TXDOT/Grantor jurisdiction.
- j. Transportation Code 223.004 – TXDOT/Grantor must open bids at a public meeting.
- k. Transportation Code 223.154 – TXDOT/Grantor must open proposals in a manner that does not disclose their contents to competing offerors during negotiations.

Required Practices

- a. For all projects with federal or state funds using other than a design-build process, the City must open and read bids in a public forum.
- b. For all design-build projects with federal or state funds, the City must open proposals in accordance with the solicitation.
- c. For all projects with federal and/or state funds and all projects on the state highway system, the City must submit bid tabulation (post-award tabulation of proposed prices for design-build) to TXDOT/Grantor as part of a request for TXDOT/Grantor to concur in award.
- d. For projects with no federal or state funds, the City may use their own procedures for opening bids and proposals.

City Responsibilities

- a. Submit procedure to assure public opening of bids.
- b. Open and read bids in public forum.
- c. Submit bid tab to TXDOT/Grantor.
- d. For design-build, open proposals in accordance with solicitation.
- e. For design-build, forward post-award tabulation to TXDOT/Grantor.

Distribution of Bid Documents

General. The advertisement and approved plans and specifications must be available to bidders a minimum of three weeks prior to opening of bids in accordance with 23 CFR 635.112. Shorter periods may be approved by TXDOT/Grantor's in special cases when justified.

Federal Regulation

- a. 23 CFR 635.112 – Design-bid-build
 - i. Bid documents must be available to bidders a minimum of 3 weeks before bid opening.
 - ii. Shorter periods may be approved in special cases where justified.
- b. 23 CFR 635.112 – Design-build
 - i. FHWA's approval of the Request for Proposals constitutes approval to release the document.
 - ii. The administering entity may determine the appropriate distribution schedule.

State Regulation

- a. Local Government Code 262.025 (counties) – The advertisement must include a statement where specifications may be obtained.
- b. Local Government Code 271.025 (municipalities, counties, and other local governments) – The advertisement must state the location where bid documents may be examined.
- c. Local Government Code 271.184 – Design-build projects must be advertised including time and place of bid opening according to any manner prescribed by law.
- d. Texas Administrative Code, Title 43, §9.13 – TXDOT/Grantor must give bid documents to bidders meeting prequalification requirements on request of the bidder.
- e. Government Code 2155.083 (state agencies) – Part of the notice in the Electronic State Business Daily must include all information necessary for a bidder to make a successful bid.
- f. Transportation Code 366.185 – Regional Tollway Authorities must adopt rules governing competitive bidding.
- g. Transportation Code 370.184 – Regional Mobility Authorities must adopt rules governing procurement of projects.

Required Practices

- a. Distribution of bid documents will be to all prequalified bidders in accordance with the advertisement or request for proposals.

City Responsibilities

- a. Assure approved bid documents are available at least 3 weeks before bid opening.
- b. For design-build, follow approved Request for Proposals.
- c. For concessions, follow provisions of agreement with TXDOT/Grantor.

SECTION 3.4

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Workers Compensation Insurance

General. Government Code §406.906 requires that contractors and subcontractors performing on a building or construction contract with a governmental entity must provide written certification that workers' compensation insurance coverage is provided for each individual employed on the public project.

Federal Regulation

a. No provision

State Regulation

a. Labor Code 406.096 - A governmental entity that enters into a building or construction contract shall require the contractor to certify in writing that the contractor provides workers' compensation insurance coverage for each employee of the contractor employed on the public project.

Required Practices

a. For all projects, City must require the contractor to provide written certification the workers' compensation insurance coverage.

City Responsibilities

a. Prior to contract execution, the City must require the contractor to provide written certification that workers' compensation insurance coverage is provided to each contractor and subcontractor employee working on the project.

Contract Execution - Other

See the following project requirements in the Bid Document Preparation section:

- Bonding
- Child Support Documentation
- Disadvantaged Business Enterprises (DBE), Historically Underutilized Businesses
- (HUB), and Small Business Enterprises (SBE)
- Railroad Insurance

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SECTION 3.5

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Americans with Disabilities Act

General. The Americans with Disabilities Act (ADA) is codified at United States Code (USC) Title 42 Chapter 126 and requires equal opportunity for individuals with disabilities. Title II of the ADA governs public facilities including roads and sidewalks. Such opportunity prohibits discrimination against individuals with disabilities in government services, public accommodations, transportation and telecommunications. Further, "reasonable accommodation" must be provided to qualified individuals with disabilities. Federal regulation located at 49 CFR 37.41 provides that the construction of any new transportation facility shall afford ready accessibility and utilization by individuals with disabilities. 49 CFR 32.43 also requires that when altering any existing transportation facility, the City must ensure that the alterations are made in such a way as to afford maximum opportunity to provide ready access and utilization by individuals with disabilities. 49 CFR 37.3 defines a facility as: "...all or any portion of buildings, structures, sites, complexes, equipment, roads, walks, passageways, parking lots, or other real or personal property, including the site where the building, property, structure, or equipment is located".

Federal Regulation

- a. 28 CFR 35 – Prohibits discrimination on the basis of disability by public entities. It extends the prohibition of discrimination in federally assisted programs established by section 504 of the Rehabilitation Act of 1973 to all activities of State and local Governments, including those that do not receive Federal financial assistance.
- b. 49 CFR 37 – Prohibits discrimination against an individual with a disability in connection with the provision of transportation services. It also provides requirements placed on the Construction or Alteration of transportation facilities by public entities. Applies to federally funded projects.

State Regulation

- a. Occupations Code, Chapter 51 – Establishes the Texas Department of Licensing and Regulation (TDLR).
- b. Government Code 469 – Ensures that public buildings and facilities are accessible to and functional for persons with disabilities.
 - i. Section 469.101 – Requires plan and specification approval by TDLR for buildings and facilities covered by the statute when the estimated construction cost is in excess of \$50,000.
 - ii. Section 469.105 – Requires inspection of buildings and facilities covered by the statute by TDLR or Registered Accessibility Specialist.

Required Practices

- a. For all public facilities including projects on the public right-of-way with an excess of \$50,000 in pedestrian elements, the City must submit plans to TDLR for review and approval.
- b. All projects, including projects on public right-of-way must comply with the provisions of the cited statutes.
- c. The City is responsible for coordination of TDLR inspection and for paying all fees assessed by TDLR.

City Responsibilities

- a. Ensure all public facilities; including transportation facilities with an excess of \$50,000 in pedestrian elements are in compliance.
- b. Submit plans to TDLR.
- c. Request final inspection from TDLR.

TXDOT/Grantor Responsibilities

- a. For projects with state or federal funds and all projects on the state highway system, the City will submit a certification sealed by an engineer licensed in Texas that construction standards have been met. The District will conduct a final inspection before issuing final payment to the City. TXDOT should make the City aware of any ADA concerns noted during periodic inspections during construction.
- b. TXDOT must verify that TDLR has conducted their final inspection and have the City's certification before recommending TXDOT/Grantor final acceptance of the project and final payment to the City (if state or federal funds are used).

Contractor Purchase of Equipment for City

General. Equipment, as defined in 49 CFR 18.3, means "tangible, nonexpendable, personal property having a useful life of more than one year and an acquisition cost of \$5,000 or more per unit." All other tangible personal property is considered to be "supply". When the City must purchase equipment to adequately meet the construction engineering requirements of a Federal-aid project, how the equipment is purchased (e.g. by the City directly or by a construction contractor with ownership transferred to the City) is irrelevant to Federal-aid participation. The City has two options for requesting Federal-aid participation for eligible program costs. Most costs incurred by the City are eligible for Federal-aid reimbursement either as a direct cost or an indirect cost. Indirect cost rates must be approved by TXDOT/Grantor prior to reimbursement.

Cities requesting federal participation in direct costs must amortize the equipment's cost over its useful life. Federal-aid funds will participate only in that portion of the amortized cost attributable to the time the equipment is used on a specific Federal-aid project(s).

Federal Regulation

- a. 23 USC 302 – States (and other governmental agencies) must be suitably equipped to discharge their duties.
- b. 23 CFR 140 – States (and other governmental agencies) may be reimbursed for eligible construction engineering costs, railroad and audit work.

State Regulation

- a. No comparable statute.

Required Practices

- a. FHWA issued a policy memorandum on May 5, 1993 clarifying federal participation in equipment purchased by the contractor for the City to discharge their construction engineering responsibilities. Federal participation is limited to the cost of the equipment amortized for the time it is used on the project.
- b. As a matter of policy, TXDOT/Grantor will limit state fund participation in accordance with FHWA policy.
- c. On projects with no federal or state funds, the City may follow their own practices.

City Responsibilities

- a. Submit amortization schedule to TXDOT/Grantor for approval.

Convict (Inmate) Labor

General. There are limitations on using convict labor on Federal-aid projects. For example, FHWA's regulation states: "No construction work shall be performed by convict labor at the site or within the limits of any Federal-aid highway construction project from the time of award of the contract or the start of work on force account until final acceptance of the work by the State Transportation Agency (TXDOT/Grantor) unless it is labor performed by convicts who are on parole, supervised release, or probation."

This same principal applies to projects administered by a city.

The principle behind the prohibition of convict labor is that use of convict labor restricts competition since convict labor can be furnished at rates well below market labor costs or force account rates.

The terms "parole, supervised release, or probation" refer to the status of a person who has completed the condition of imprisonment. "Supervised release" does not include inmates currently serving their imprisonment terms while performing supervised work either inside or outside the walls of the incarcerating facility. Thus it is not acceptable to have inmates who are currently serving the terms of their incarceration performing work on a project where convict labor is prohibited.

Federal Regulation

a. 23 CFR 635.117(a) – Prohibits the use of convict labor for projects on roadways functionally classified above a rural minor collector.

State Regulation

a. Transportation Code 223.044 – Allows TXDOT/Grantor to contract with a criminal justice agency for the provision of inmate labor on a state highway improvement project.

Required Practices

- a. The City must gain TXDOT/Grantor concurrence before allowing convict or inmate labor in the following conditions:
- i. Federal funds on a roadway functionally classified as rural minor collector or local road and on the state system.
 - ii. State funds on the state system.
- b. The City may use their own practices in the following conditions:
- i. Federal funds on a roadway functionally classified as Rural Minor Collector or Local Road and off the state system.
 - ii. State funds off the state system.
 - iii. Projects with no federal or state funds.

City Responsibilities

- a. For projects on all functional classes above Rural Minor Collector, ensure that the contractor does not use convict labor.
- b. For all functional class of rural minor collector, local road, if state funds are used on-system, gain TXDOT/Grantor concurrence for use of convict (inmate) labor if on state system.

Environmental Protection

General. Environmental protection commitments are often made during the planning and design process. These commitments must be carried forward into the PS&E and through construction.

Federal Regulation

- a. 23 CFR 635.309(j) – The authorizing entity must make a determination that appropriate measures have been included in the bid documents to ensure that conditions and commitments made to mitigate environmental harm are implemented.
- b. 23 CFR 771.109(b) – Commitments made during the environmental process must be implemented.
- c. 23 CFR 636.109 – For design-build projects, the Request for Proposals must address how environmental commitments and mitigation measures will be implemented.

State Regulation

- a. Texas Administrative Code, Title 43, §2.1 – TXDOT/Grantor policy statement on the environment.
- b. Texas Administrative Code, Title 43, §2.1(e) – Transportation projects using state funds must comply with applicable state and federal environmental laws.
- c. Texas Administrative Code, Title 43, §26.35 – For projects on the state highway system, the Regional Mobility Authority must agree to be responsible for implementing all environmental commitments.
- d. Texas Administrative Code, Title 43, §27.3 – For projects on the state highway system, proposers under a comprehensive development agreement must comply with NEPA.
- e. Texas Administrative Code, Title 43, §27.44 – For projects on the state highway system, Regional Tollway Authorities must comply with Texas Administrative Code, Title 43, Chapter 2, Subchapter C.

Required Practices

- a. All projects will comply with TXDOT/Grantor policy to protect, preserve and, when practicable, enhance the environment.

City Responsibilities

- a. Include environmental commitments in bid documents.
- b. Evaluate environmental commitments before approving changes to contract.
- c. For design-build include environmental commitments in RFP.
- d. For concession projects follow as outlined in agreement with TXDOT/Grantor.

TXDOT/Grantor District Responsibilities

- a. All projects must have environmental clearance from TXDOT/Grantor before starting construction. For projects requiring TXDOT/Grantor approval of bid documents or requests for proposals, ensure that all environmental commitments are included.
 - i. Design-bid-build – Environmental clearance is prior to letting.
 - ii. Design-build – Environmental clearance before construction. Requests for proposals may be issued before environmental clearance if specifically approved by FHWA.

- iii. Concessionaire – Refer to concessionaire agreement.
- b. For projects requiring TXDOT/Grantor approval of change orders, check the environmental document to ensure that the changed work is part of the approved environmental document.

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False Statements

General. The following notice is contained in 23 CFR 635.119 and must be posted on each Federal-aid highway project in one or more places where it is readily available to and viewable by all personnel concerned with the project.

Notice to All Personnel Engaged on Federal-Aid Highway Projects

United States Code, Title 18, Section 1020, which reads as follows:

Whoever, being an officer, agent, or employee of the United States, or of any State or Territory, or whoever, whether a person, association, firm, or corporation, knowingly makes any false statement, false representation, or false report as to the character, quality, quantity, or cost of the material used or to be used, or the quantity or quality of the work performed or to be performed, or the costs thereof in connection with the submission of plans, maps, specifications, contracts, or costs of construction of any highway or related project submitted for approval to the Secretary of Transportation; or Whoever, knowingly makes any false statement, false representation, false report, or false claim with respect to the character, quality, quantity, or cost of any work performed or to be performed, or materials furnished or to be furnished, in connection with the construction of any highway or related project approved by the Secretary of Transportation; or Whoever, knowingly makes any false statement or false representation as to a material fact in any statement, certificate, or report submitted pursuant to the provisions of the Federal-aid Road Act approved July 11, 1916 (39 Stat. 355), as amended and supplemented, Shall be fined not more than \$10,000 or imprisoned not more than five years, or both.

Federal Regulation

a. 23 CFR 635.119 – Requires that a False Statements notice be posted on all federally funded projects. Form FHWA-1022.

State Regulation

a. No comparable statutes

Required Practices

a. Posting the notice is not required on projects with no federal funds.

City Responsibilities

- a. Ensure Form FHWA-1022 is posted on job site.
- b. Report to TXDOT/Grantor incidents involving False Statements.

Inspection

General. The City and grantors have certain inspection responsibilities. All Federally funded projects must be completed in accordance with the approved plans, specifications and authorized changes. Federal agencies have the responsibility of assuring proper stewardship of Federal funds. Projects must meet minimum design standards before Federal funds can be authorized.

This is one function of the PS&E approval process. Once authorized, the project must be built to follow the PS&E. Any changes must be approved before Federal funds can participate.

Some projects have direct FHWA involvement, meaning that FHWA is part of all approval actions. For the majority of Federal-aid projects, TXDOT/Grantor assumes FHWA's approval authority. One approval action required on all projects is acceptance of the completed work. When accepted, TXDOT/Grantor certifies that the completed project meets all approval criteria.

Complete confidence that a project meets all approved criteria can be accomplished only by full-time involvement in all phases of the project. For TXDOT/Grantor, this is neither practical nor desirable. By executing an agreement with TXDOT/Grantor, the City assures that it has the staff to manage all project functions. TXDOT/Grantor verifies the City's actions by conducting periodic inspections. However, it is the City's day-to-day responsibility to determine compliance with the approved plans, specifications and contract administration requirements.

Compliance with the plans, specifications and contract administration requirements have many parts. One part is assuring that the contractor meets all material and construction requirements. This can be summarized as "quality of the construction". If the City is not adequately staffed to assure quality construction, it can retain the services of an engineering or architectural firm. If this option is chosen, the firm's services must be secured in compliance with 23 CFR 172B.

One often-overlooked principle is that contract administration issues are also important. For example, a specification implementing Davis-Bacon wages and the associated monitoring and reporting requirements has as much validity as a specification on concrete quality. To assure full contract compliance and Federal participation, the City is responsible for day-to-day inspection.

When the City executes an agreement with TXDOT/Grantor, the City is providing assurance that they are staffed to manage the project and are capable of managing all requirements, including contract administration responsibilities.

23 CFR 1.36 states: "If the (Federal Highway) Administrator determines that a State (or City) has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to the State (or City) of Federal funds on account of such project, withhold approval of further projects in the State (or to the City), and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State (or City) to the satisfaction of the Administrator."

23 CFR 635.105 states: "The STD (TXDOT/Grantor) has responsibility for the construction of all Federal-aid projects, and is not relieved of such responsibility by authorizing performance of the work by a local public agency. The STD (TXDOT/Grantor) shall be responsible for insuring that such projects receive adequate supervision and inspection to insure that projects are completed in conformance with approved plans and specifications.

When a project is located on a street or highway over which the SDT (TXDOT/Grantor) does not have legal jurisdiction, or when special conditions warrant, the SDT (TXDOT/Grantor), while not relieved of overall project responsibility, may arrange for the local government having jurisdiction over such street or highway to perform the work with its own forces or by contract provided the following conditions are met:

- When the work is to be performed under a contract awarded by a local public agency, all Federal requirements shall be met.
- The local government is adequately staffed and suitably equipped to undertake and satisfactorily complete the work; and
- In those instances where a local government elects to use consultants for construction engineering services, the local government shall provide a full-time employee of the agency to be in responsible charge of the project."

Federal Regulation

- a. 23 USC 114 – Requires that federally funded projects be constructed under the direct supervision of the state transportation agency (TXDOT/Grantor).
- b. 23 USC 302 – States must have a transportation department with adequate powers and be suitably equipped and organized to carry out the duties required by this title.
- c. 23 CFR 635.105 – Supervising agency
 - i. For projects under a local public agency's jurisdiction, TXDOT/Grantor may allow the local public agency to directly manage projects if TXDOT/Grantor has assurance that City staffing and inspection is adequate. This means:
 - 1. All Federal requirements shall be met.
 - 2. The local public agency must be adequately staffed and suitably equipped to undertake and satisfactorily complete the work
 - 3. When the local public agency elects to use consultants for construction engineering services (inspection), the local public agency must provide a full-time employee of the agency to be in responsible charge of the project.
 - iii. Procurement of consultant inspection staff must be procured using the provisions of 23 CFR 172.

State Regulation

- a. Texas Administrative Code, Title 43, Chapter 9, Subchapter C
 - i. Allows TXDOT/Grantor to contract for construction engineering and inspection services.
 - ii. Provides selection criteria that comply with state law and 23 CFR 172.
- b. Government Code 2254 – Provides for procurement of professional services by all governmental entities.

- c. Local Government Code 271.188 – For design-build projects, the City must provide or contract for inspection services that are independent from the design-build firm.
- d. Occupations Code 1001.003 – Includes “review of the construction or installation of engineered works to monitor compliance with drawings or specifications” in the definition of “practice of engineering”.
- e. Occupation Code 1001.407 – Requires engineering construction of public works be performed under the supervision of an engineer. Applies to all political subdivisions in Texas.

Required Practices

- a. For all federally and state funded projects, and all projects on the state highway system, the City must:
 - i. Ensure that projects will be constructed in conformance with the approved plans and specifications.
 - ii. Name a full time employee in responsible charge of the project and advise TXDOT/Grantor of any changes in personnel.
 - iii. Make inspection staff accessible for periodic reviews and inspections by TXDOT/Grantor.
 - iv. Provide a certification sealed by an engineer licensed in Texas that specified material quality and construction standards were met.
- b. For projects off the state system and no federal or state funding, assure project is constructed under supervision of a professional engineer licensed in Texas.

City Responsibilities

- a. Name full time employee of agency to be in responsible charge
- b. Provide adequate project supervision and inspection.
- c. Assure supervision of inspection staff by licensed professional engineer.
- d. Procure consultant services per TAC, Title 43 if needed.

TXDOT/Grantor District Responsibilities

- a. General – All projects have an executed agreement between the City and TXDOT/Grantor. Part of the agreement is delineation of roles and responsibilities. One of the City’s roles is to name a “Responsible person in charge” of the project. The District is to also name a “Responsible person in charge” who should develop a relationship with the City’s “responsible person” with the goal of establishing trust and confidence that the project is properly prosecuted.
- b. For projects with state or federal funds and all projects on the state system, conduct periodic inspections during the life of the project. Monitor the level of inspection and discuss inspection concerns with the City in view of their responsibilities as outlined in the agreement with TXDOT/Grantor.
- c. For projects with state or federal funds, review and approve all proposed agreements between the City and private inspection firms to ensure compliance with the provisions of Texas Administrative Code, Title 43.
- d. There is no monitoring on projects without state or federal funds that are not on the state system.

Progress Payments

General. Progress payments are compensation to the prime contractor for the value of work performed during a covered period.

Payments should be based on estimates, prepared by the engineer, of the value of the work performed and materials delivered or stockpiled in accordance with the contract.

As the construction project progresses, the City may request that the grantor reimburse the City for the Federal share of the estimated costs for completed work. The progress payments are generally made monthly, but can be more frequently with grantor concurrence. All requests for Federal reimbursements of payments to the contractor by the City must go through TXDOT/Grantor.

Stockpiled Materials: When the contract provisions provide for stockpiled materials, Federal participation is based on the appropriate value of approved specification materials delivered by the contractor to the project site, or other designated location in the vicinity of such construction, provided that:

- Stockpiled material is stored in such manner that security and the inventory can be maintained,
- The material is supported by a paid invoice or receipt for delivery, with the contractor furnishing the paid invoice within a reasonable time after receiving payment from the City,
- The material conforms with the requirements of the plans and specifications,
- The materials have not been delivered or stockpiled prematurely in advance of the contractor's schedule of operations, and
- The quantity of the material eligible for participation does not exceed the quantity required by the project, nor does the value exceed the appropriate portion of the contract item in which the material is to be incorporated.

Retention for Subcontract Work - The US DOT's DBE regulation at 49 CFR 26.29 requires recipients to include a "prompt pay clause" in all Federally-funded contracts as follows:

- Prime contractors to pay subcontractors for satisfactory performance of their contracts no later than 30 days (NOTE, Government Code §2251.022 requires a contractor to pay a subcontractor not later than 10 days after receiving payment for a governmental entity (this supersedes the 30 days) from receipt of each payment by the prime; and
- Prompt return of retainage payments within 30 of days (NOTE, Government Code §2251.022 requires a contractor to pay a subcontractor not later than 10 days after receiving payment for a governmental entity. This supersedes the 30 days.) after the subcontractor's work is satisfactorily completed.

Texas Government Code §2251.022 requires a contractor to pay a subcontractor not later than 10 days after receiving payment for a governmental entity

Final Payment: By statute (23 U.S.C. 121(b)), FHWA cannot make final payment for a project until TXDOT/Grantor approves the completion of its construction. A final inspection of the project should determine whether the actual construction conforms to the approved plans and specifications, including all approved changes. TXDOT/Grantor's final inspection may be an actual on-site inspection performed at or near project completion, an in-depth review of the City's project records at or near project completion or a finding that is based on a process review of the City's internal project controls which demonstrates that the City is properly exercising its internal controls.

Government Code Chapter 2251 Subchapter B stipulates that payment from the City to the contractor is considered late on the 31st. day after:

- The date the governmental entity receives the goods under the contract;
- The date the performance of the service under the contract is completed; or
- The date the governmental entity receives an invoice for the goods or services.

Late payments to the contractor will be subject to the appropriate interest as determined by the comptroller in accordance with Government Code 2251.025.

Federal Regulation

- a. 23 USC 121(a) – Authorizes periodic payment of construction costs incurred. Payment may include the value of stockpiled material not yet incorporated into the project.
- b. 23 USC 121(b) – Final payment may be made after project completion.
- c. 23 CFR 635.122 – Further defines periodic progress payments and requirements for federal participation in stockpiled material.
- d. 23 CFR 635.122(c) – For design-build projects, procedures for making progress payments on lump sum contracts must be defined in the request for proposals.
- e. 49 CFR 26.29 – The US Department of Transportation's DBE regulation requires that the prime contractor must pay subcontractors for satisfactory work performance within 30 days of receipt of payment from the contracting agency.

State Regulation

- a. Texas Constitution - Art 3-Sec. 5D - Invoices to TXDOT/Grantor must include sufficient details to answer who, what, when, where, and how expenses are billed.
- b. Texas Administrative Code, Title 43, Chapter 26.33(g)(1) – A Regional Mobility Authority must use specifications that conform to the latest TXDOT Standard Specifications on projects that connect with the state highway system.
- c. Texas Administrative Code, Title 43, Chapter 27.56(c)(3) – A Regional Tollway Authority must use specifications that conform to the latest TXDOT Standard Specifications on projects with state fund participation.
- d. Government Code §2251.021 – Requires payment to a contractor within 30 days or interest will accrue.
- e. Government Code §2251.042 allows payment of interest involving a claim if the claim is resolved in favor of the contractor.
- f. Government Code §2251.022 requires a contractor to pay a subcontractor not later than 10 days after receiving payment from a governmental entity.

Required Practices

- a. For all projects with federal and state funds, the City must request payment through TXDOT/Grantor in sufficient time to assure payment to prime contractor complies with state and federal statutes.
- b. For projects with state or federal funds, a Regional Mobility Authority and a Regional Tollway Authority must adopt TXDOT/Grantor specification articles 9.6 through 9.8 or develop comparable contract language for TXDOT/Grantor approval regardless of system.
- c. For projects with no state or federal funds, the City should pay the contractor in accordance with the terms of the contract.
- d. For all projects on the state system with no state or federal funds, the City must notify TXDOT/Grantor when all work is satisfactorily complete to give TXDOT/Grantor the opportunity to conduct a final inspection.

City Responsibilities

- a. Adopt TXDOT/Grantor specification articles 9.6 through 9.8 or submit alternate specification to TXDOT/Grantor for approval.
- b. Pay contractor within 30 days.
- c. Request periodic payment of completed work through TXDOT/Grantor to FHWA.
- d. Ensure payment to the contractor is issued before requesting reimbursement from TXDOT/Grantor.
- e. Invoices to TXDOT/Grantor must include:
 - i. clear and concise description of items billed
 - ii. clear description of services rendered and materials purchased
- f. Request TXDOT/Grantor final inspection when all work is satisfactorily completed.
- g. Assure subcontractors receive payment from prime contractor within 10 days.
- h. For design-build, include procedures for making progress payments on lump sum contracts in the request for proposals, if applicable.
- i. For concessions, pay concessionaire in accordance with agreement.

TXDOT/Grantor Responsibilities

- a. Conduct at least two site visits per project for the purpose of verifying items being billed are legitimate and the items exist and are within the scope of the contract. One visit should occur during peak activity, to ensure the local government (City) has submitted sufficient supporting documentation for file and verify that expenses have been incurred before requesting reimbursement from TXDOT/Grantor.
- b. There is no monitoring on projects without state or federal funds or for projects where monthly estimates are not submitted to TXDOT/Grantor for reimbursement (i.e. passthrough tolls).
- c. For projects with state or federal funds, submit City requests for payment for processing.
 - i. Review approximately 10% of the City's estimates per project to ensure work billed has been performed.

Quality Assurance Program

General. In conjunction with 23 CFR Part 637, Subchapter B, the City must implement a quality assurance (QA) program to ensure that the materials and workmanship incorporated into each contract involving federal participation are in conformance with the requirements of the approved plans and specifications, including any approved changes. This QA Program (QAP) must include an acceptance program and an independent assurance (IA) program consisting of the following components:

Acceptance Program

- ◆ Frequency guide schedules for verification sampling and testing;
- ◆ Identification of the verification sampling and testing locations;
- ◆ Identification of the desired finished product quality attributes; and
- ◆ Dispute resolution system, when quality control sampling and testing results are used as part of the acceptance decision.

IA Program

- ◆ Schedule of frequency for IA evaluation;
- ◆ Sampling procedures;
- ◆ Testing procedures; and
- ◆ Testing equipment.

The City may develop its own QA Program, or adopt the appropriate TXDOT/Grantor QA Program pertinent to the type of project delivery method used:

- ◆ Quality Assurance Program for Design-Bid-Build Projects
- ◆ Quality Assurance Program for Design-Build Projects

A statewide TXDOT/Grantor QAP for Concession projects currently does not exist; therefore, the City must submit a project-specific QAP through TXDOT/Grantor to FHWA for approval. Any program developed by the City must receive approval from TXDOT/Grantor prior to use.

Federal Regulation

- a. 23 CFR 637B – For projects on the National Highway System, the contracting agency must have a Quality Assurance Program approved by the Federal Highway Administration. The program must provide for an acceptance program and an independent assurance program and is intended to assure the quality of materials used in construction.
- b. 23 CFR 637B, Appendix A – Provides a certification that materials incorporated into a project on the National Highway System are in conformity with the approved plans and specifications.
- c. 23 CFR 637.207(a)(1)(iv) – For design-build projects, warranties may be used where appropriate.
- d. 23 CFR 637.207(b) – For design-build and concession projects, requirements for a Quality Assurance Program still apply. The Program shall meet FHWA Technical Advisory 6120.3 in addition to 23 CFR 637.207(b).

State Regulation

- a. Local Government Code 271.116 – A municipality or county governmental entity shall provide or contract for, independently of the contractor, the inspection services, the testing of construction materials engineering, and the verification testing services necessary for acceptance of the facility or project by the governmental entity.
- b. Local Government Code 271.188 – For design-build projects, the CITY must provide or contract for material engineering, testing and verification testing that is independent from the design-build firm.
- c. Texas Administrative Code, Title 43, Chapter 26.33(g)(1) – A Regional Mobility Authority must use specifications that conform to the latest TXDOT/Grantor Standard Specifications on projects that connect with the state highway system.
- d. Texas Administrative Code, Title 43, Chapter 27.56(c)(3) – A Regional Mobility Authority must use specifications that conform to the latest TXDOT/Grantor Standard Specifications on projects with state fund participation.

Required Practices

- a. For all projects with state or federal funds and all projects on the state highway system, the City must either adopt the TXDOT/Grantor Quality Assurance program or submit an equivalent program to TXDOT/Grantor for approval. The program must provide reasonable assurance that the materials incorporated into the project substantially meet specification requirements.
- b. 23 CFR 637.207(a)(3) – The preparation of a materials certification, conforming in substance to Appendix A of this subpart, shall be submitted to the FHWA Division Administrator (TXDOT/Grantor) for each construction project which is subject to FHWA construction oversight activities.
- c. For all projects with state or federal funds and all projects on the state highway system, the City must submit a letter of certification sealed by a licensed engineer that all materials incorporated into the project are in conformity with the approved plans and specifications.
- d. For projects off the state highway system and funded by local or private funds, the City may use their own Quality Assurance program.

City Responsibilities

- a. Adopt the appropriate TXDOT/Grantor Quality Assurance Program for the project delivery method used or submit a program through TXDOT/Grantor to FHWA that meets the requirements of 23 CFR 637B.
- b. For design-bid-build, design-build, and concession projects where the developer (contractor) is responsible for QA tests, the City is to employ an independent lab to verify the developer's (contractor's) QA tests in accordance with FHWA Technical Advisory 6120.3. TXDOT/Grantor has an electronic data and materials management system that supports meeting the requirements of Technical Advisory 6120.3 and may be licensed from TXDOT/Grantor.
- c. Assure compliance with approved program.
- d. Submit letter of certification sealed by a licensed engineer that all materials incorporated into the project are in conformity with the approved plans and specifications to TXDOT/Grantor when construction is complete.

Records

General. Project records support payment of contract work. Project records fall into many categories, such as documentation of pay quantities, test reports supporting that the materials used meet specification requirements and a variety of contract administration documentation. For example, 23 CFR 635.123 states, "The STD shall have procedures in effect which will provide adequate assurance that the quantities of completed work are determined accurately and on a uniform basis...All such determinations and all related source documents upon which payment is based shall be made a matter of record. Initial source documents pertaining to the determination of pay quantities are among those records and documents which must be retained pursuant to 49 CFR part 18. "

The non-regulatory supplement to 23 CFR 637 Subpart B defines verification/check samples and tests as those samples and tests performed by State and City personnel to verify the results of certified tests or the manufacturers' certifications or specification compliance for manufactured materials. There must be documentation to demonstrate specification compliance.

FHWA does not specify the content and format of job records. However, FHWA approves TXDOT/Grantor manuals and procedures used on Federal-aid projects. The City has the option of adopting TXDOT/Grantor's job record process or submitting its own for TXDOT/Grantor concurrence. The goal is to give TXDOT/Grantor a level of comfort when they certify to FHWA that a project has been completed in substantial conformity with the approved plans and specifications, including authorized changes.

Federal Regulation

- a. 23 CFR 635.123 – Requires that procedures be in place to provide adequate assurance that quantities of completed work are accurately and uniformly determined. Such determinations and source documents are a matter of record.
- b. 49 CFR 18.42 – Project records must be kept for 3 years after the date of acceptance of the project by TXDOT/Grantor and must be made available for review by federal and state officials.

State Regulation

- a. Various

Required Practices

- a. For projects with state or federal funds and projects on the state highway system regardless of funding source, the City must use TXDOT/Grantor's Records Retention Manual (available from TXDOT/Grantor) or submit an alternate procedure for TXDOT/Grantor approval. This approval must be received before work on the project begins.
- b. For projects with no state or federal funds that are not on the state highway system, the City may follow their own practices.

City Responsibilities

- a. Adopt TXDOT/Grantor Records Retention Manual or submit record management system to TXDOT/Grantor for approval.
- b. Retain records for 3 years after final project acceptance by TXDOT/Grantor.

Salvage Credits

General. Salvaged materials associated with a contract must be disposed of in accordance with the state statute requirements located at Government Code Chapter 2175, Surplus and Salvage Property. The Texas Facilities Commission rules related to these statutory requirements are located at 1 TAC Chapter 126. The disposition of property must be made through competitive bidding or auction to the highest bidder.

Federal Regulation

- a. 49 CFR 18.36 – Non-state agency grantees will use their own procurement procedures which reflect applicable State and local laws and regulations, provided that the procurements conform to applicable Federal law and the standards identified in 49 CFR 18.
- b. FHWA Policy Memorandum dated October 3, 1988 – Requires a credit for material salvaged from the project unless the state agency has a procedure in place that does not require salvage credit. The process to determine salvage credit is described.

State Regulation

- a. Texas Administrative Code, Title 1, Chapter 126 – Describes a process for disposal of surplus property owned by a state agency.
- b. Government Code 2151 – Describes procedures used by the Texas Building and Procurement Commission for sale of excess state property.

Required Practices

- a. For projects on the state system with state and federal funds, the City must follow the procedures described in 1 TAC Chapter 126.
- b. For all projects, the contract documents must be clear on ownership of material found on the project. For contract work, the contractor's bid price will reflect the cost of disposal or ownership.

City Responsibilities

- a. Follow provisions of 1 TAC, Chapter 126 through contact with Texas Facilities Commission

TXDOT/Grantor Responsibilities

- a. For projects on the state system with state or federal funds, review plans and change orders for disposal of surplus property for compliance with the Texas Administrative Code.
- b. There is no monitoring on projects without state or federal funds unless specified in the agreement with TXDOT/Grantor.

Specification Compliance

General. Once authorized, the project must be built to follow the PS&E. Any changes must be approved before Federal funds can participate. Compliance with the plans, specifications and contract administration requirements have many parts. One part is assuring that the contractor meets all material and construction requirements. This can be summarized as "quality of the construction".

One often-overlooked principle is that contract administration issues are also important. For example, a specification implementing Davis-Bacon wages and the associated monitoring and reporting requirements has as much validity as a specification on concrete quality. 23 CFR 1.36 states, "If the (Federal Highway) Administrator determines that a State (or City) has violated or failed to comply with the Federal laws or the regulations in this part with respect to a project, he may withhold payment to the State (or City) of Federal funds on account of such project, withhold approval of further projects in the State (or to the City), and take such other action that he deems appropriate under the circumstances, until compliance or remedial action has been accomplished by the State (or City) to the satisfaction of the Administrator."

Federal Regulation

a. 23 CFR 635.105 – TXDOT/Grantor has responsibility for the construction of all federally funded projects, and is not relieved of such responsibility by authorizing performance of the work by a local public agency. Compliance with specifications is part of that responsibility.

State Regulation

a. No comparable statute

Required Practices

a. On projects where TXDOT/Grantor participates with state or federal funds or projects on the state system, the City must:

- i. Secure written TXDOT/Grantor approval of any changes to the specifications before being incorporated into the project,
- ii. Afford TXDOT/Grantor reasonable access to the project for inspection,
- iii. Provide a written certification (signed by a licensed professional engineer) that the completed project substantially complies with the plans and specifications as approved by TXDOT/Grantor. The certification must be signed by a representative of the City with the authority to sign the certification.

b. For projects with no state or federal funds off the state system, the City may determine specification compliance in accordance with their own procedures.

c. The agreement between the City and TXDOT/Grantor will establish that projects meet specifications and will discuss compliance with specifications.

City Responsibilities

- a. Follow provisions of agreement with TXDOT/Grantor.
- b. Gain TXDOT/Grantor approval of specification changes.
- c. Accommodate TXDOT/Grantor inspection.

d. Provide engineering certification of compliance to TXDOT/Grantor.

TXDOT/Grantor Responsibilities

- a. For projects with state or federal funds or on the state system:
 - i. Conduct periodic inspections during construction.
 - ii. Review and approve all change orders.
 - iii. Retain City's written engineering certification of compliance with the plans and specifications as part of the official project records.
- b. There is no monitoring on projects without state or federal funds off the state system.

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Statements and Payrolls

General. Under the Copeland Act, workers are protected from paying "kickbacks" to employers for the "privilege" of being employed.

Form FHWA-1273 includes the following sections related to payrolls:

- Section V.1. The Department of Labor regulations that implement the Copeland Act are incorporated by reference in the Form FHWA-1273.
- Section V.2. The regulations require that the contractor, and subcontractors, furnish weekly certified payroll statements to the City. The weekly payroll statement is to include information on employees and wages so that compliance with the Davis-Bacon requirement of Section IV may be verified.

The City must review the payroll statements for completeness and certification, and then "spot-check" items, such as: classification, hourly rate, authorized deduction, fringe benefits, overtime hours and rate, and net wages paid. The City must also conduct employee interviews that are cross-referenced to classifications and hourly rates in the payroll. While minor discrepancies may be resolved with the contractor, the City should refer any apparent violations to the Office of Inspector General.

The USDOL's Davis-Bacon and Related Acts requirement for payment of prevailing wages may be found in 29 CFR Part 5. Enforcement provisions are addressed in Section 5.6. It states in part the following: "The Federal agency shall cause such investigations to be made as may be necessary to assure compliance with the labor standards clauses required by 5.5...". Also: "Investigations shall be made...with such frequency as may be necessary to assure compliance." It further states: "Such investigations shall include interviews with employees ... examination of payroll data..."

The FHWA's implementation of the USDOL requirement is found in Title 23, U.S.C. Section 113. Section 113 states in part: "(a) The Secretary [USDOT] shall take such action as may be necessary to insure that all laborers and mechanics employed by contractors and subcontractors on the construction work performed on highway projects on the Federal-aid highways...be paid wages at rates not less than those...as determined by the Secretary of Labor..."

For purposes of this guide, the City is considered the "contracting agency". The City is required to ensure:

- A representative sampling of employees is interviewed to verify contractor compliance, and
- Contractor and subcontractor payroll records are reviewed on a sampling basis.

The regulation does not require 100% coverage; it requires coverage frequency "... as may be necessary to assure compliance". TXDOT/Grantor and the City must agree on what coverage is appropriate. All contractors and subcontractors on the project must be included in the spotcheck. Contractors or subcontractors with violations must be reviewed in more detail.

Federal Regulation

- a. 23 USC 113 – Requires the Secretary of Transportation to take all steps necessary to assure laborers and mechanics working on federally funded projects are paid no less than the prevailing wage for similar work.
- b. 40 USC § 3141 et seq – Requires the Secretary of Labor to implement regulations including a provision that each contractor and subcontractor shall furnish weekly a statement with respect to the wages paid each employee during the preceding week.
- c. 29 CFR 3.1 – Requires contractors and subcontractors to submit weekly statements of wages paid on work covered by Davis-Bacon.
- d. 29 CFR 5.6(a)(3) – Requires recipients of federal funds to conduct investigations at a frequency necessary to assure compliance. The investigations must include employee interviews and examination of payroll data.
- e. 23 CFR 635.118 - For all projects, copies of payrolls and statements of wages paid, filed with the State as set forth in the required contract provisions for the project, are to be retained by the STD for the time period pursuant to 49 CFR part 18 (3 years) for review as needed by the Federal Highway Administration, the Department of Labor, the General Accounting Office, or other agencies.
- f. 23 CFR 636.119(c) – Design-build projects must conform to all non-procurement requirements, including Davis-Bacon.
- g. Form FHWA 1273
- i. Section V.1. incorporates the Department of Labor regulations in the Copeland Act (anti kickback provisions)
- ii. Section V.2. requires weekly, certified payroll submissions by the contractor and subcontractors.

State Regulation

- a. Government Code 2258.024 – Describes records to be kept by contractor and subcontractor concerning minimum wages paid. The records must be made available to inspection by the contracting entity.
- b. Government Code 2258.026 – Allows a contractor to accept a certification from a subcontractor in lieu of actual records.
- c. Government Code 2258.051 – Requires the public entity investigate complaints and withhold payment for violations.

Required Practices

- a. For all projects with state or federal funds, the City must adopt TXDOT/Grantor's procedures for monitoring wage rate compliance or submit an alternate program for TXDOT/Grantor approval.
- b. For projects with no state or federal funds, the City does not have to submit their monitoring procedures for TXDOT/Grantor approval.

City Responsibilities

- a. Include FHWA-1273 in contract.
- b. Adopt TXDOT/Grantor monitoring program or submit alternate program for TXDOT/Grantor approval.
- c. Monitor compliance according to approved program.

Supervision and Staffing

General. The City must be suitably equipped and staffed before they can be given authority to manage Federal-aid projects within their jurisdiction. 23 CFR 635.105 requires that TXDOT/Grantor be suitably equipped and organized to carry out the Federal-aid program. Therefore, TXDOT/Grantor is responsible for design, contract administration and construction inspection of all Federal-aid construction projects. This responsibility is formalized by the project agreement that is executed for each Federal-aid project. FHWA and TXDOT/Grantor are the two parties to the agreement.

When a Federal-aid project is to be constructed on a facility that is not under TXDOT/Grantor's jurisdiction, TXDOT/Grantor may allow the Local Government (City) having jurisdiction to perform the work with its own forces, or by contract, provided that all of the following conditions are met:

- ◆ All Federal requirements, including those prescribed in 23 CFR 635 Subpart A, are satisfied on work performed under a contract awarded by a local public agency,
- ◆ Force account work shall be in full compliance with 23 CFR 635 Subpart B,
- ◆ The Local Government is adequately staffed and suitably equipped to undertake and satisfactorily complete the work, and
- ◆ The Local Government shall provide a full-time employee of the agency to be in responsible charge of each Federal-aid project, including those that employ consultants for construction engineering services.

This arrangement does not relieve TXDOT/Grantor of overall responsibility for the project. While 23 CFR 1.11(b) allows TXDOT/Grantor to: "utilize, under its supervision, the services of well-qualified and suitably equipped engineering organizations of other governmental instrumentalities for making surveys, preparing plans, specifications and estimates, and for supervising the construction of any project,"

23 CFR 1.11(e) clearly states that TXDOT/Grantor is not relieved of its responsibilities under Federal law and the regulations in 23 CFR if it chooses to use the services of other governmental engineering organizations.

Supervision of construction engineering consultants or construction management firms. The City's responsibilities for contract administration and construction inspection are not terminated should a consultant provide construction engineering and inspection services.

While a consultant may provide daily inspection, the City must assign a full-time employee to be in responsible charge of the project at all times, although the engineer need not be assigned solely to that project. "Responsible charge "means the City engineer is:

- Aware of the day-to-day operations on the project;
- Aware of and involved in decisions about changed conditions which require change orders or supplemental agreements;
- Aware of the qualifications, assignments, on-the-job performance, etc., of the consultant staff at all stages of the project; and

- Visiting the project on a frequency that is commensurate with the magnitude and complexity of the project.

If the City uses the services of a consulting engineering or construction management firm, the services must have been procured in compliance with 23 CFR Part 172.

Federal Regulation

a. 23 CFR 635.105 - For projects under a local public agency's jurisdiction, TXDOT/Grantor may allow the local public agency to directly manage projects if TXDOT/Grantor has assurance that City staffing is adequate

State Regulation

a. Occupation Code 1001.407 – Requires engineering construction of public works be performed under the supervision of an engineer. Applies to all political subdivisions in Texas.

b. Transportation Code 201.113 – Allows TXDOT/Grantor to enter into an agreement with a Regional Tollway Authority for projects on the state highway system.

c. Transportation Code 223.201 – Allows TXDOT/Grantor to enter into a comprehensive development agreement with a private entity.

d. Transportation Code 370.302(a) – TXDOT/Grantor may enter into an agreement with a Regional Mobility Authority to implement, operate, and maintain a project on behalf of TXDOT/Grantor.

e. Transportation Code 370.302(b)(1) – A Regional Mobility Authority may negotiate with private entities through a Comprehensive Development Agreement. The negotiations may include financing.

Required Practices

a. The agreement or contract will include assignment of duties and responsibilities. This will include designation of a “City responsible person in charge”. Prior to executing the agreement, the City must assure TXDOT/Grantor that the projects will be staffed to TXDOT/Grantor's satisfaction. Changes to that assurance must be approved by TXDOT/Grantor prior to implementation.

City Responsibilities

a. Assure TXDOT/Grantor that the project will be staffed to TXDOT/Grantor's satisfaction

b. Advise TXDOT/Grantor of any changes in staffing

c. Assure construction is under supervision of PE registered in Texas

d. Comply with terms of agreement with TXDOT/Grantor

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Abbreviations and acronyms used

AASHO	American Association of State Highway Officials
AASHTO	American Association of State Highway and Transportation Officials
ADA	American with Disabilities Act
AED	Associated Equipment Distributors (international trade association)
Blue Book	Equipment Rental Rates Blue Book
CE	Construction Engineering
CFR	Code of Federal Regulations
CIP	Capital Improvement Program / Project
CM	Contract Manager
CMT	Contract Management Team
CM(T)	Contract Manager and/or Contract Management Team
COA, City	City of Austin
CUF	Commercially Useful Function
DBE	Disadvantaged Business Enterprise
DHS	Department of Homeland Security
DOE	Department of Energy
EEO	Equal Employment Opportunity
EEOC	Equal Employment Opportunity Commission
EPA	Environmental Protection Agency
EPLS	Excluded Parties List System
FAA	Federal Aviation Administration
FAPG	Federal- Aid Policy Guide
FAPG NS	Federal-Aid Policy Guide Non-Regulatory Supplement. Current policies, regulations and non-regulatory procedural guidance information related to the Federal-Aid Highway Program.
FHWA	Federal Highway Administration
FHWA 1273	Required Contract Provisions Federal-Aid Construction Contracts (Supplemental General Conditions Standard Federal-Aid Assurances / COA 00810A)
FRA	Federal Railroad Administration
FTA	Federal Transit Administration
GSA	General Services Administration
HUB	Historically Underutilized Business
IA	Independent Assurance
IFR	Interim Final Rule
MOU	Memorandum of Understanding

NHS	National Highway System
NHTSA	National Highway Traffic Safety Administration
NTSB	National Transportation Safety Board
OIG	Office of the Inspector General
OMB	Office of Management and Budget
OMB Circular	Instructions or information issued by OMB to federal agencies.
OSHA	Occupational Safety and Health Administration
PM	Project Manager
PS&E	Plans, Specifications and Estimates
QA	Quality Assurance
QAP	Quality Assurance Program / Plan
ROW	Right of Way
SAFETEA- LU	Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users (2005)
SBE	Small Business Enterprise
SMBR	Small and Minority Business Resources Department
STA	State Transportation Agency
STD	State Transportation Department
TAC	Texas Administrative Code
TCP	Traffic Control Plan
TDLR	Texas Department of Licensing and Regulation
TEA-21	Transportation Equity Act for the 21st Century (1998)
TRB	Transportation Research Board
TSA	Transportation Security Administration
TTC	Texas Transportation Commission
TXDOT	Texas Department of Transportation
USC	United States Code
USDOL / DOL	United States Department of Labor
USDOT / DOT	United States Department of Transportation

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